Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors

HIGH COURT (IPOH) — CRIMINAL TRIAL NO PCT 45-20 OF 1998
KANG HWEE GEE J
1 NOVEMBER 1999

Criminal Law *— Murder — Circumstantial evidence — Discovery of body and stolen jewelleries — Common intention to rob established — Multiple wounds discovered on bodies of victims, whether inference of mens rea — Whether all accused acted in concert to execute murders — Whether mere hire of car spotted at scene of crime alone sufficient to implicate third accused with murder*

Criminal Procedure *— Trial — Prima facie case — End of prosecution's case — Right's to remain silent — Whether court entitled to infer that accused has no worthy defence — Whether court entitled to convict*

Evidence *— Admissions — Admission by co-accused — Probative value outweighed prejudicial effect — Allegation that information obtained by way of oppression — Whether ground for court to reject admission — Evidence Act 1950 s 27*

The first, second and third accused were charged for the murder of four people. No one saw any of the accused causing the death of any of the victims. The case for the prosecution in so far as the actual acts of killing in all the four cases were concerned was entirely on circumstantial evidence. The first and the second accused gave information which led to the discovery of the body of the victim in the fourth charge and some of the jewellery that was taken from the safe of the jewellery shop. The defence argued that: (i) the police were not witnesses of truth and that there was a strong probability that the accused had not actually given the information and that the police already knew of the existence of the body and the jewellery in which event the body and the jewellery were not discovered but merely recovered by the police; (ii) the words 'yang kami ambil dari kedai emas itu' in the notes should not be admitted as it did not relate distinctly to the discovery of the jewellery being an information of the 'past history' of the jewellery; and (iii) the information were obtained in an oppressive manner, both the accused having been vigorously interrogated for long hours. The court found that only the first and second accused could be inculpated in the charges and the charges were amended accordingly. The court also found that the prosecution had made out a prima facie case in respect of each charge as amended and called upon the first and second accused to enter their defence on each of the amended charge. The first accused elected to remain silent and not to call any evidence. The second accused chose to give evidence on oath.

Held, finding both accused guilty as charged:

(1) The evidence against the first and second accused was compelling. It was sufficient to establish a prima facie case against them. However, the evidence was clearly lacking to inculpate the third accused with the killings in any of the four charges. The fact that he had rented the hotel room and hired the car together with the second accused and the fact that the car was seen at the scene of crime one and half hours afterwards were insufficient to constitute proof of his involvement in the murders with or without the common intention of the first and second accused. They were at most mere suspicions that he may have committed the murders. Therefore, the third accused was acquitted (see p 293C–F).

(2) The judge was vested with a discretion whether to exclude any evidence that may have been obtained improperly from the accused and he was bound to exercise his discretion by applying the test whether the prejudicial effect of its admission would outweigh its probative value. Far from being of trifling weight, the information provided by the respective accused in the instant case were of enormous value to the prosecution whose case may stand or fall by them. Their probative value certainly outweighed their prejudicial effect. There was therefore no valid ground to reject them on the basis that they may not have been given voluntarily by the respective accused. In any case, there was no evidence of any form of oppression beyond that which was reasonably expected and required by the police to obtain information to find the killers of the four persons. Having heard the evidence of the police personnel and the officers who received the information and the submissions of counsel for the accused and the prosecutor, the court was convinced that there was no ground to disallow their admission under s 27 of the Evidence Act 1950 (see pp 298C–D, H–299A, C).

(3) By themselves the information were incapable of inculpating the accused with the charges. But in assessing the case for the prosecution, the court was obliged to apply deductive reasoning to draw such inferences or to arrive at such factual presumptions as necessary from these information. The presumption that must be drawn against the accused under s 114 of the Evidence Act 1950 from the fact of the discovery was that he had killed the watchman. By reason that the same type of strings used to tie up the boy and the maid in the house and considering that their killings were executed in the same transaction as the killing of the woman, it must be presumed that he had also killed the boy, the maid and the woman at the house (see pp 303D, 307B–C).

(4) It was true that no one saw either of the accused kill any of the victims in any of the four charges either alone or jointly. But no doer of a criminal act committed in stealth as in the present case

would expose his intention. Therefore, the common intention in all the four charges must of necessity be gathered from the surrounding circumstances of the case. The evidence was highly indicative that the killings were the result of the intentional act of more than one person. Given that one had led to the discovery of the body and the other to the discovery of the jewellery and also given that it was clear that their common intention was to rob the shop of the jewellery, the court was satisfied that they were in fact acting in concert in executing the killings (see p 308D–I).

(5) The multiple wounds inflicted on the respective victims by a sharp object as found by the forensic pathologist in respect of each charge could only lead to one and only one conclusion — that the person who caused them had intended to commit murder. This satisfies the plenary requirement of mens rea of the offence under s 300(a) of the Penal Code. In such a situation, intention is a matter of inference. Further, having examined the case for the prosecution with regard to the discovery of the body and the jewellery and the facts that relate distinctly to their discovery, the court found that both the accused had acted with common intention to kill all the four victims (see p 310B–C, G–H).

(6) Having decided that the prosecution had proved a prima facie case against the first accused and having called him to enter his defence following which he has elected to remain silent and not to call any evidence, the court must find the first accused guilty and convict him on all the four charges as amended (see p 312G–H).

(7) The second accused had chosen not to say a word about the discovery of the jewellery although the evidence was damning enough against him. His failure to say anything on this crucial allegation convinced the court that he did not have any defence worthy of consideration except for the bare denial that he had committed the murders. Failure to respond to the telling features in a positive manner served only to reinforce the prosecution case. But demenour alone was not the sole criteria in judging a person's credibility. There were other reasons why the second accused was not a witness of truth and therefore should not be believed (see p 317B–C, E–G).

(8) The accused had the inherent right to silence in that he was not bound to disclose to the police after his arrest what his defence would be when he was charged in court. The court was not inferring that by his failure to inform the police at the first reasonable opportunity of his story regarding his chanced discovery of the break in of the jewellery shop, he was in fact guilty. What the court was inferring was that such a story was inconsistent with his claimed innocence, which the court was entitled to draw. Having considered the evidence given by the second accused, the court was satisfied that he had failed to raise a reasonable doubt on the prosecution case in each of the four

charges as amended. Accordingly, he was found guilty and convicted on all the charges (see pp 319A, G–320A).

[Bahasa Malaysia summary

Tertuduh pertama, kedua dan ketiga telah dituduh membunuh empat orang. Tiada sesiapa yang melihat mana-mana daripada tertuduh menyebabkan kematian mana-mana mangsa tersebut. Kes pihak pendakwa setakat mana yang berkaitan perbuatan sebenar membunuh di dalam empat kes tersebut terletak sepenuhnya atas keterangan ikut keadaan (circumstantial evidence). Tertuduh pertama dan kedua telah memberikan maklumat yang telah membawa kepada penemuan mayat mangsa di dalam pertuduhan pertama dan beberapa barang kemas yang telah diambil daripada peti keselamatan kedai emas itu. Pihak pembela menghujahkan bahawa: (i) pihak polis bukan merupakan saksi yang boleh dipercayai dan bahawa terdapat kemungkinan besar yang tertuduh mungkin tidak memberikan maklumat tersebut dan bahawa pihak polis telahpun mengetahui kewujudan mayat dan barang kemas tersebut di mana mayat dan barang kemas tersebut tidak dapat ditemui tetapi hanya dijumpai oleh pihak polis; (ii) perkataan-perkataan 'yang kami ambil dari kedai emas itu' di dalam nota-nota tersebut tidak sepatutnya diterima kerana ia tiada kaitan langsung dengan penemuan barang kemas itu sebagai satu maklumat 'sejarah lalu' tentang barang kemas tersebut; (iii) maklumat telah diperolehi dengan cara menindas, di mana kedua-dua tertuduh tersebut telah disoal siasat bertubi-tubi untuk beberapa jam lamanya. Mahkamah telah mendapati bahawa hanya tertuduh pertama dan kedua boleh dikatakan bersalah di dalam pertuduhan-pertuduhan tersebut dan pertuduhan-pertuduhan tersebut telah dipinda sewajarnya. Mahkamah juga mendapati bahawa pihak pendakwa telah mewujudkan satu kes prima facie mengenai setiap pertuduhan seperti mana yang telah dipinda dan memanggil tertuduh pertama dan kedua untuk memasuki pembelaan mereka untuk setiap pindaan pertuduhan tersebut. Tertuduh pertama telah memilih untuk berdiam diri dan tidak memanggil apa-apa keterangan. Tertuduh kedua telah memilih untuk memberi keterangan bersumpah.

Diputuskan, mendapati kedua-dua tertuduh bersalah seperti dituduh:

(1) Keterangan terhadap tertuduh pertama dan kedua amat kuat. Adalah mencukupi untuk mewujudkan satu kes prima facie terhadap mereka. Namun begitu, keterangan adalah jelas tidak mencukupi untuk mengatakan tertuduh ketiga bersalah terhadap pembunuhan tersebut di dalam mana-mana empat pertuduhan itu. Hakikat bahawa beliau telah menyewa bilik hotel itu dan menyewa sebuah kereta bersama dengan tertuduh kedua dan

hakikat bahawa kereta tersebut telah dilihat di tempat kejadian jenayah itu satu setengah jam kemudiannya adalah tidak mencukupi untuk membentuk bukti tentang penglibatan beliau di dalam pembunuhan tersebut dengan atau tanpa niat bersama tertuduh pertama dan kedua tersebut. Mereka lebih-lebihpun hanya mensyaki bahawa beliau mungkin telah melakukan pembunuhan tersebut. Oleh demikian, tertuduh ketiga telah dibebaskan (lihat ms 293C–F).

(2) Hakim telah diberikan budi bicara sama ada untuk mengecualikan mana-mana keterangan yang mungkin telah diperolehi dengan tidak betul daripada tertuduh dan beliau terikat untuk menggunakan budi bicara beliau dengan memakai ujian sama ada kesan yang menjejaskan kemasukannya akan mengatasi nilai probatifnya. Jauh daripada mempunyai beban yang remeh, maklumat yang diberikan oleh tertuduh terutamanya di dalam kes ini mempunyai nilai yang besar kepada pihak pendakwa di mana maklumat ini boleh mengakibatkan kes itu berjaya atau gagal. Nilai probatifnya mengatasi kesannya yang menjejaskan. Oleh demikian, tiada alasan sah untuk menolaknya berdasarkan bahawa ia mungkin tidak diberikan secara sukarela oleh tertuduh masing-masing. Di dalam apa keadaanpun, tiada keterangan mengenai apa-apa bentuk penindasan yang melebihi apa yang dijangkakan dan diperlukan oleh pihak polis untuk memperolehi maklumat untuk mencari pembunuh-pembunuh empat orang tersebut. Setelah mendengar keterangan pihak personel polis dan pegawai-pegawai yang menerima maklumat tersebut dan penghujahan peguam tertuduh dan pihak pendakwa, mahkamah yakin bahawa tiada alasan untuk tidak membenarkan pengakuan mereka di bawah s 27 Akta Keterangan 1950 (lihat ms 298C–D, H–299A, C).

(3) Dengan sendirinya, maklumat tersebut tidak dapat mengatakan tertuduh bersalah atas pertuduhan-pertuduhan tersebut. Tetapi dengan menilai kes pihak pendakwa, mahkamah terpaksa menggunakan pertimbangan yang deduktif untuk memperoleh inferens-inferens sebegini atau tiba kepada anggapan yang berdasarkan fakta yang perlu daripada maklumat tersebut. Anggapan yang patut diperoleh terhadap tertuduh di bawah s 114 Akta Keterangan 1950 daripada fakta penemuan adalah bahawa beliau telah membunuh pengawal itu. Oleh sebab jenis tali yang sama telah digunakan untuk mengikat budak lelaki dan pembantu rumah di dalam rumah itu dan dengan mengambil kira bahawa pembunuhan mereka telah dilakukan di dalam transaksi yang sama sebagai mana pembunuhan wanita tersebut, maka ia semestinya boleh dianggap bahawa beliau telah juga membunuh budak lelaki, pembantu rumah dan wanita di rumah itu (lihat ms 303D, 307B–C).

(4) Adalah benar bahawa tiada siapa melihat mana-mana daripada tertuduh yang dituduh membunuh mana-mana mangsa di dalam

mana-mana empat pertuduhan sama ada secara berseorangan atau bersesama. Tetapi tiada pembuat suatu perbuatan jenayah yang dilakukan secara sembunyi-sembunyi seperti mana di dalam kes ini akan mendedahkan niat beliau. Oleh demikian, niat sama di dalam empat pertuduhan tersebut seharusnya perlu dikumpulkan daripada keadaan sekitar kes ini. Keterangan dengan jelas menunjukkan bahawa pembunuhan-pembunuhan tersebut merupakan akibat daripada perbuatan yang disengajakan oleh lebih daripada seorang. Dengan mengambil kira bahawa seorang itu telah membawa kepada penemuan mayat dan seorang lagi kepada penemuan barang kemas dan juga mengambilkira bahawa jelas niat bersama mereka adalah untuk merompak kedai emas tersebut, mahkamah telah berpuas hati bahawa mereka sebenarnya telah bertindak bersesama di dalam melakukan pembunuhan tersebut (lihat ms 308D–I).

(5) Kecederaan yang pelbagai yang dialami oleh mangsa masing-masing disebabkan benda tajam sebagaimana yang ditemui oleh ahli patalogi forensik tentang setiap pertuduhan hanya boleh membawa kepada satu dan hanya satu kesimpulan — bahawa orang yang menyebabkannya mempunyai niat untuk melakukan pembunuhan. Ini telah memenuhi keperluan mutlak mens rea terhadap kesalahan di bawah s 300(a) Kanun Keseksaan. Di dalam keadaan ini, niat merupakan satu perkara inferens. Tambahan pula, setelah memeriksa kes pihak pendakwa berhubung dengan penemuan mayat dan barang kemas tersebut dan fakta-fakta yang jelas mengaitkan penemuan mereka, mahkamah mendapati bahawa kedua-dua tertuduh telah bertindak dengan niat sama untuk membunuh semua empat mangsa tersebut (lihat ms 310B–C, G–H).

(6) Setelah membuat keputusan bahawa pihak pendakwa telah membuktikan satu kes prima facie terhadap tertuduh pertama dan setelah memanggil beliau untuk memasuki pembelaan beliau berikutan di mana beliau telah memilih untuk berdiam diri dan tidak mengemukan sebarang keterangan, mahkamah seharusnya mendapati tertuduh pertama bersalah dan mensabitkannya di atas semua empat pertuduhan tersebut sebagaimana yang dipinda (lihat ms 312G–H).

(7) Tertuduh kedua telah memilih untuk tidak mengatakan apa-apa tentang penemuan barang kemas tersebut walaupun keterangan amat menjahanamkan terhadap beliau. Kegagalan beliau untuk mengatakan apa-apa tentang dakwaan yang penting ini meyakinkan mahkamah bahawa beliau tidak mempunyai apa-apa pembelaan yang wajar dipertimbangkan kecuali hanya penafian bahawa beliau telah melakukan pembunuhan-pembunuhan tersebut. Kegagalan untuk memberi jawapan di dalam cara yang positif hanya memperkukuhkan kes pihak pendakwa. Tetapi perilaku dengan sendirinya bukanlah merupakan satu-satunya

kriteria untuk menilai kebolehpercayaan seseorang. Terdapat sebab-sebab lain kenapa tertuduh kedua bukan merupakan saksi yang boleh dipercayai dan oleh demikian tidak sepatutnya dipercayai (lihat ms 317B–C, E–G).

(8) Tertuduh mempunyai hak tersirat untuk berdiam diri di mana beliau tidak terikat untuk mendedahkan kepada pihak polis selepas beliau ditangkap tentang apa pembelaan beliau apabila beliau dituduh di mahkamah. Mahkamah tidak membuat inferens bahawa dengan kegagalan beliau untuk memaklumkan pihak polis pada peluang pertama yang munasabah berhubung dengan cerita beliau mengenai penemuan beliau secara kebetulan tentang pecah masuk ke dalam kedai emas itu, bahawa beliau sebenarnya bersalah. Apa yang mahkamah membuat inferens adalah bahawa cerita sedemikian tidak konsisten dengan ketakbersalahan yang dikatakan oleh beliau, yang mahkamah berhak untuk memutuskan. Setelah mempertimbangkan keterangan yang diberikan oleh tertuduh kedua, mahkamah berpuas hati bahawa beliau telah gagal untuk menimbulkan keraguan yang munasabah terhadap kes pihak pendakwa dalam setiap daripada empat pertuduhan tersebut sebagaimana yang dipinda. Sewajarnya, beliau didapati bersalah dan disabitkan dengan semua pertuduhan-pertuduhan tersebut (lihat ms 319A, G–320A).]

Notes

For cases on murder generally, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 887–919.

For cases on prima facie case, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3496–3508.

For a case on admission by co-accused, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) para 73.

Cases referred to

Abdullah bin Saad v PP [1956] MLJ 92 (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Arulpragrasan v PP [1997] 1 MLJ 389 (refd)
Chong Soon Koy v PP [1977] 2 MLJ 78 (refd)
Emperor v Chintamoni Shahu AIR 1930 Cal 379 (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507 (refd)
Lt Kol Yusof bin Abdul Rahman v Kol Annuar bin Md Amin [1997] 1 MLJ 562 (refd)
Madugula Jermiah, Re 1957 AIR Andhra Pradesh 611 (refd)
Md Desa bin Hashim v PP [1995] 3 MLJ 350 (refd)
Miller v Minister of Pensions [1947] 2 All ER (refd)
Ng Thian Soong v PP [1990] 2 MLJ 148 (refd)
PP v Dato' Seri Anwar Ibrahim (No 3) [1999] 2 MLJ 1 (refd)

PP v Liew Sam Seong [1982] 1 MLJ 223 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Paneerselvan & Ors [1991] 1 MLJ 106 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)
Pulukury Kotayya v King Emperor (1947) 74 IA 65 (refd)
Queen-Empress v Sami and Anor (1890) ILR 13 Mad 426 (refd)
R v Carr-Braint [1943] 2 All ER 156 (refd)
Sainal Abidin Mading v PP [1999] 4 MLJ 497 (refd)
Shaiful Edham bin Adam & Anor v PP [1999] 2 SLR 57, *Mallal's Current Law* (April 1999 issue) para 289 (refd)
Sogaimuthu Padayachi v King Emperor ILR 50 Mad 274 (AIR 1926 Mad 638) (refd)
Teng Boon How v PP [1993] 3 MLJ 553 (refd)
Tengku Mahmood v PP [1974] 1 MLJ 110 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (refd)
The Emperor v Sheik Neamatulla (1913 17 CWN 1077 (refd)
Wai Chan Leong v PP [1989] 3 MLJ 356 (refd)
Wasim Khan v State of Uttar Pradesh [1956] SCR 191 (refd)

Legislation referred to

Criminal Procedure Code ss 113, 277
Evidence Act 1950 ss 27, 114
Indian Evidence Act 1872 s 114 [India]
Penal Code ss 299, 300

Murtazadi bin Amran (Deputy Public Prosecutor) for the prosecution.
Ajit Singh (*J Ajit Singh & Co*) for the first accused.
Azahar bin Yeop Ismail (*Azahar & Co*) for the second accused.
Tan Kian Boo for the third accused.

Kang Hwee Gee J: The charges against the accused read as follows:

Pertuduhan Pertama

Bahawa kamu bersama-sama pada 12 Mac 1998 antara jam 5.15 petang hingga 8.00 malam di rumah No 82, Laluan Tasek Timur 16, Taman Seri Dermawan, Bercam, Ipoh di dalam daerah Kinta, di dalam Negeri Perak Darul Ridzuan, dengan niat bersama kamu semua telah melakukan bunuh ke atas Sathian a/l Nalliah, K/P 830223–08–5885. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama di bawah s 34 Kanun yang sama.

Pertuduhan Kedua

Bahawa kamu bersama-sama pada 12 Mac 1998 antara jam 5.15 petang hingga 8.00 malam di rumah No 82, Laluan Tasek Timur 16, Taman Seri Dermawan, Bercham, Ipoh, di dalam daerah Kinta, di dalam Negeri Perak Darul Ridzuan, dengan niat bersama kamu semua telah melakukan bunuh ke atas Virama a/p Subramaniam, K/P 490726–06–5028. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh

dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama di bawah s 34 Kanun yang sama.

Pertuduhan Ketiga

Bahawa kamu bersama-sama pada 12 Mac 1998 antara jam 5.15 petang hingga 8.00 malam di rumah No 82, Laluan Tasek Timur 16, Taman Seri Dermawan, Bercham, Ipoh, di dalam daerah Kinta, di dalam Negeri Perak Darul Ridzuan, dengan niat bersama kamu semua telah melakukan bunuh ke atas Juriyah, No Pasport Indonesia XA 872162. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama di bawah s 34 Kanun yang sama.

Pertuduhan Keempat

Bahawa kamu bersama-sama pada 12 Mac 1998 antara jam 9.00 malam hingga 10.00 malam di Chitra Jewellers, No 27, Jalan Lahat, Ipoh, di dalam daerah Kinta, di dalam Negeri Perak Darul Ridzuan, dengan niat bersama kamu semua telah melakukan bunuh ke atas Balakrishnan a/l Mania, K/P 490707–08–5023. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama di bawah s 34 Kanun yang sama.

For convenience the prisoners in this trial, Krishna Rao, Rajendran and Kumaresan are designated the first, second and third accused respectively.

The case for the prosecution

In the early hours of 1 am on 13 March 1998, a Sikh youth, Harminderjit Singh was driving his car along Jalan Lahat intending to go for his supper, when he heard the sound of a burglar alarm which he perceived to have come from a jewellery shop called Chitra Jewellery. The shop was situated along the road he was driving along. As he approached the shop he saw two Indian persons coming out from it. They entered into a dark blue Proton Iswara car bearing registration No PCV 7749. He noticed that another person was at the driver's seat of the car. The car then sped off towards Ipoh City. He followed the car through the town until the round-about where the Menteri Besar's house was. The car turned into Jalan Gopeng and disappeared.

After having his supper, Harminderjit Singh decided to lodge a police report of the incident. He called at the Central Police Station, Ipoh where he met a lady Enquiry Officer on duty a Sergeant Bashah who took down his report, which in substance was about a break-in of the shop. She then informed the police officer on duty at the time, Inspector Azli.

Following the report, at about 3.30 am, Inspector Azli, Seargent Malek, Corporal Che Jusuh and a police photographer Syed Alwi went to the shop to investigate. Another police party consisting of Inspector Zaim, Inspector Poonam and Corporal Ishak had arrived there earlier.

Upon investigation, he noted that the grilled door to the shop was closed but was not locked. He went inside the shop. Three padlocks, were

found to be lying on the floor of the shop. Two of them had keys attached to them. Another padlock with a key attached to it was found on top of a showcase.

A motorcycle Registration No ADN 4330 and a mattress were also found inside the shop. The motorcycle was later ascertained to belong to Balakrishnan the watchman, the victim in the fourth charge.

A safe at the rear portion of the shop had been opened, but did not show any sign of breakage. The safe had fourteen tiered compartments, out of which eight appeared to be used to store items of jewellery which were placed in trays with each tray occupying a compartment. The top two compartments had trays with items of jewellery still in place (as in photographs exh P91(8) and (9)). The rest of the compartments were without any trays in them. The trays appeared to have been removed from the compartments and emptied of their contents. They lay discarded on the floor at the bottom of the safe. A tray with some items of jewellery was found lying on the floor in front of the safe.

Upon enquiring from the neighbouring shop owner one Abdul Rashid, he was informed that the owner of the jewellery shop was away in India and that the owner and his family stayed at house No 82 Laluan Tasik Timur 16, Taman Sri Dermawan, Bercham, Ipoh.

On his instruction, Corporal Che Jusuh, Lance Corporal Azmi, Lance Corporal Tambahan Razak accompanied by the said Abdul Rashid went to the said house.

Upon arrival at the house at about 6.40am, Corporal Che Jusof noticed that the gate to the house was not locked. He entered into the compound of the single storey corner terrace house and called out to the occupant but received no reply. He then went to the back portion of the house and found the grilled door to the kitchen ajar. He entered the house. In the master bedroom, he found a body of a female Indian lying on the floor in a pool of blood. In the second room he found a body of a male Indian lying face down on the bed with both his hands tied up and both eyes bounded up by adhesive tapes. On the floor in the same room he found the body of a female person lying face up in a pool of blood.

Following the discovery of the bodies at the house, the conduct of the case was officially handed over to the investigating officer of this case, Assistant Superintendent of Police Ravinder Singh. He went to said house with a police party arriving at the place at sometime past 8 am on the same day. He entered the house through the kitchen door at the rear. He found no sign of a break-in as the kitchen door and the iron grille was not locked, and the front door was locked from inside.

He noticed that there were traces of blood at the kitchen area. The fan, lights and the TV in the living room were on. There were blood stains on the floor.

In the master bedroom, he recovered the dead body of the female Indian later ascertained to be Virama a/p Subramaniam, the wife of Nalliah a/l Periasamy (PW26) the owner of Chitra Jewellery. The deceased was

wearing a saree which was soaked in blood. There were also blood on her head. The room was ransacked. A

In another room, he recovered the body of the male Indian later ascertained to be Sathian a/l Nalliah, the 15-year old son of the owner of the shop. The deceased was found lying sideways on the bed. Both his hands were tied together with strings and his eyes were bound with a black plastic tape. There were blood on his head and on the back of his body. There were also blood stains on the bed. B

In the same room on the floor at the left side of the bed he recovered the body of the other female, later ascertained to be that of Juriyah (also known as Sariyah), the Indonesian maid in the employ of the family. She was lying face upwards in a pool of blood with a pillow covering her face. There was blood all over her body. C

The floor of the living room was also covered with blood. The telephone line was cut off. From a television rack in the living room he recovered a blade from a pair of scissors with its end broken. It was stained with blood. The other blade was recovered from the writing table in the room where the two bodies were found. D

Police action was commendably swift. Acting on information received, at 12.30pm on the same day (13 March 1998) the second and third accused were arrested at a house No 14 A Lahat Lane by a police party from the Unit Gerak Cepat led by Inspector Shamsul Bahari. Ten minutes later at about 12.40pm the car, Registration No PCV 7749 was recovered at a parking lot of a flat in front of Wisma Chin Woo at Jalan Hussein, Ipoh. E

At about 12.45 pm, the same police party raided Room 502 Hotel Ritz Kowloon, Jalan Yang Kalsom, lpoh and arrested the first accused.

All the three accused were handed over to ASP Ravinder by the Unit Gerak Cepat at 2.45 pm on the same day. To facilitate his investigation into the case, he detained them at different locations. F

The first accused was subsequently taken into the custody of three police detectives, Detective Sergeant Ramasamy, Detective Corporal Jagathesan and Detective Corporal Subramaniam on the same day. They proceeded to interrogate him from 4.25 pm until 10.20 pm when he was handed over to Inspector Bubagaran who conducted further interrogation on him alone in his room. There he gave certain information with respect to the disposal of the body of the watchman Balakrishnan (the victim in the fourth charge). He later led the inspector and detectives to the discovery of the said body at the 292.4 km of the North-South Highway. Upon the discovery of the body, the following day (14 March 1998) he gave a cautioned statement to ASP Siva. G H

On the following day (14 March 1998) the second accused gave a cautioned statement to Chief Inspector Vesvanathan. On 15 March 1998, from 2pm to 11pm, further interrogation was conducted on him by ASP Ravinder, Sergeant Subraminiam and Inspector Raguraman who acted as Tamil interpreter with the purpose of obtaining information as to the whereabout of the jewellery which was taken from the jewellery shop. I

In the course of the interrogation, the second accused gave certain information which led eventually to the discovery of some items of jewellery under a tree at a place called Baling Bom, which belonged to the Police Field Force, Ulu Kinta.

The third accused was interrogated by ASP Harith Kam at 4.30 pm until 6.15pm on the same day of his arrest. Subsequently, the next day (14 March 1998) he gave a cautioned statement to Chief Inspector Saralathan.

All the three cautioned statements given by the three accused were ruled inadmissible following a voir dire hearing in respect of each of the statement in the course of the trial. For the sake of brevity I do not propose to state my reasons for rejecting them except to say that they fell far short of the requirement of voluntariness under s 113 of the Criminal Procedure Code. For the sake of brevity, I do not propose to consider them in this judgment, as their relevance is now purely academic being not a part of the case for the prosecution.

Nalliah (PW26) the owner of Chitra Jewellery was a gentleman of Indian descent. He managed the shop with his wife Virama the victim in the second charge. They had three employees — a female assistant called Geeta (PW6), a goldsmith called Arunasalm (PW20) and a watchman called Balakrishnan the victim in the fourth charge. A domestic maid called Juriah the victim in the third charge helped in cleaning the shop.

Nalliah said he was away in India at the time of incident to attend the graduation of his other son. He lived at No 82 Laluan Tasik Timur, Bercham with his wife Virama and son Sathiyan. Juriah the maid of Indonesian descent lived with them and also served as cleaner at the shop.

Giving an account of the routine he practised before he left for India he said he normally opened his shop for business at 9am in the morning.

His wife Virama held the keys to the shop and the safes where the items of jewellery were kept after each day's business. The watchman would come over to the shop at closing time to lock it up. He would then hand over the key to the shop to her and would remain inside the shop for his duty for the night. She would bring all the keys (including the keys to the safe) back home with her every evening and would bring them back with her every morning upon arriving at the shop from the house. She would then hand the keys to him to enable him to open the shop and to take out the items of jewellery from the safe for display in the showcase.

When he left for India on 3 March 1998, he had left all the keys to shop and the safe to his wife.

According to him to reach the safe from outside, a person would have to open and pass four locked doors. First he would have to open the shop door and the iron grilled door. Then he would have to open the door to the office followed by another iron grilled door leading to the safe area. These doors were normally locked before they left for home. Having entered the safe area he would still have to use two keys to open the safe itself in order to have access to the items of jewellery, which were placed on trays and

slotted into the 13 compartments in the safe. He would personally keep the items in the safe before he left for home and having locked it would hand over the keys to his wife. Without these keys no one would be able to open the safe.

The third accused was his former employee at Chitra Jewellery who left later to open a jewellery shop of his own two shops away in the same row and was a friend of his family.

After being informed of the fate of his family and the misfortune that had befallen him he came back from India on 14 March 1998 and in the course of police investigation he identified some items of jewellery which were recovered after the killings as those which had been taken from his shop through the pattern and the markings on them.

Geeta and Arunasalam also gave evidence for the prosecution. Their evidence were crucial in providing a constructive account of the events proceeding the discovery of the bodies from which the prosecution is able to build its case against the accused.

Geeta, the shop assistant said she had been working as usual at Chitra Jewellery on 12 March 1998, having started work at 9 am that morning. Before she left for home at 6.15 pm that day Arunasalam, Juriah and Balakrishnan were still in the shop. Balakrishan had come to assume his duty as a watchman only at 6pm on that day. That was the last time she had seen them alive.

Arunasalam, the goldsmith said he had been with the shop for some sixyears prior to the incident. On 12 March 1998 at about 6.30 pm he had seen Virama and Juriah leaving for home after work in a taxi. At that time the shop had already been closed with the alarm set by the watchman Balakrishnan from inside.

Virama and Geetha had by then kept all the items of jewellery into the safe before closing. He identified the motorcycle Registration No ADN 4330 found by the police in the shop as belonging to the watchman.

The ownership of the Proton Iswara car Registration No PCV 7749 spotted by the Sikh youth Harminderjit Singh at the jewellery shop on the morning of 13 March 1998 was traced to an Indian person called Ramanieswaran (PW11).

He gave evidence to say that initially on 7 February 1998 he had hired out the car to the second and third accused for the period 7 February 1998 to 7 March 1998 for the sum of RM2,000. The third accused paid the rental in advance in cash. On 8 March 1998, the second and third accused returned the said car to him but rented another Proton Iswara car Registration No ACQ 4222 from him for a period of one month for the sum of RM2,000 although no money was paid to him on this occasion.

Three days later on 12 March 1998, at the late hours of 11.45 pm, the second and third accused came to see him again at his house and hired from him the same Proton Iswara car Registration No PCV 7749 which he had returned earlier at the agreed rate of RM66.60 per day, although they did not make any payment to him on that day.

The post-mortems and the findings of the forensic pathologist

The injuries on the four bodies were extensive and gory. They are best described in the words of Dr Khairul Azman, the forensic pathologist of the Ipoh Hospital who performed detailed post-mortem on them.

The post-mortems on the bodies of the first three victims were performed some eight hours later on the same day, on 13 March 1998.

On the body of Verama d/o Subramaniam, he found the following injuries:

Neck

(1) Stab wound on front of right side of neck, horizontal in position, elliptical in shape measuring 1.3 x 0.4cm. The wound was 5cm above right clavicle directed inwards and to the right forming a depth of 3cm.

(2) Stab wound on front of the neck, slightly to the right of midline, elliptical in shape and horizontal in position measuring 2 x 0.6cm. The wound was below and medial to wound No 1 directed inwards, forming a depth of 2cm. The wound pass through the airway then through the right thyroid cartilage.

(3) Stab wound on right front of the neck, 2cm below wound No 2, 1cm from midline and 2cm from medial part of right clavicle. The wound measured 1.5 x 0.5cm directed inwards and right laterally, 45 from skin surface forming a depth of 3.0cm. The wound penetrated the right sternomastoid muscles.

Chest

(4) Stab wound on the right chest horizontal in position measuring 0.6 x 2.5cm. The wound was 6cm below right clavicle, 2.5cm from midline directed upwards and inwards 30 from skin surface forming a depth of approximately 7cm. The medial end of the wound was slightly blunt measuring 0.3cm thick. The wound passed through the right second intercostal space just at the right side of the sternum then through the apex of upper lobe of right lung.

(5) Elliptical shaped, stab wound on the right chest, horizontal in position 6cm from right nipple, 4.5cm from midline and 15cm below wound No 4. The wound was directed inwards and medially, 30 from skin surface forming a depth of 7.5cm. The medial end of the wound was slightly blunt. The wound passed through the third intercostal space penetrating the front part of right upper lobe then to the pericardium and punctured the ascending aorta.

(6) Stab wound on left chest horizontal position, 4 cm from midline, 15 cm below left clavicle and 8cm from left nipple. The wound measured 2.6 x 0.2cm directed inwards and medially 60 from skin surface, forming a depth of 5.3cm. The wound caused fracture of sternum at the level of fourth ribs, enter the chest cavity lacerate the left upper lobe then pass through the pericardium and cause horizontal abrasion on outer surface of front of left side of the heart.

(7) Stab wound on left chest, horizontal in position 2cm above and medial to left nipple measuring 2.2 x 0.5cm. The lateral end of the wound form skin tag. The wound was directed inwards and upwards 20 from skin surface forming a depth of 7.0cm.

Left upper limb

(8) Faint bruise on extensor aspect left forearm measuring 4 x 2cm.

Left lower Limb

(9) Faint bruise on lateral aspect of left skin measuring 8 x 9cm.

He concluded that the deceased died from the injuries of the four stab wounds on the chest, particularly of the fourth all of which each punctured the main vessels near the heart.

On the body of Sathian a/l Nalliah he found the following injuries:

Back of neck

(1) Stab wound on the back of neck near midline, elliptical in shape, slightly oblique in position measuring 2 x 0.5cm directed inwards and towards the right forming a depth of 2.0cm.

(2) Stab wound on the back of left side of neck, elliptical in shape, slightly oblique in position, 2cm from wound No 1 and 0.1cm below back of hairline measuring 1.5 x 0.3cm directed towards the right and inwards forming a depth of 4.5cm.

(3) Stab wound on the right back of neck, elliptical in shape, slightly oblique in position, measuring 1.9 x 0.5cm directed tangentially towards the back of right ear penetrating through the skin causing exit wound 0.4 x 1cm. The right side of wound margin showed undercutting edges. The exit would was 2.5cm from back of right ear.

Back of Trunk

(4) Elliptical shaped stab wound on the back of the chest, medial to left scapular region, slightly oblique in position, 11cm from axilla, measuring 2.2 x 1.4cm. The wound was directed inwards penetrating the third intercostal space on the back of the chest into the left thoracic cavity causing a depth of 5.5cm.

(5) Stab wound on the back of left chest, 3cm medial to wound No 4. It measured 1.9 x 1.0cm passing through the third intercostal space and into left thoracic cavity.

(6) Stab wound on back of right chest elliptical in shape, vertical position measuring 1.5 x 0.6cm directed upwards and slightly to the left forming a depth of 4cm. The wound was 1cm to the right of midline and 14cm from back of neck.

(7) Stab wound on back of right chest, elliptical in shape just medial to right scapula almost vertical in position, directed inwards forming a depth of 6cm. The wound was 7.5cm from midline, 10cm from right shoulder and 11cm from back of right axilla.

(8) Stab wound on the back of chest 1.0cm from left of midline, 20cm from base of neck, almost vertical in position, elliptical in shape directed inward and slightly to the right forming a depth of 3.5cm.

Ligature marks

A ligature mark around the neck almost in complete circle and was much more prominent on the anterior part of the neck. Anteriorly, the ligature mark crossed above the laryngeal prominence approximately 1.0cm thick, parchmented and peeling of its overlying epidermis.

On the right side of the neck, the ligature mark start to divert apart to form double line each measuring 0.8cm thick. The upper ligature mark was 3cm below right ear lobe whereas the lower mark was 5cm below right ear lobe.

On the left side of the neck, the ligature mark was 4cm below left ear lobe. Just above the ligature mark on the left side, there was a small horizontal abrasion measuring 2 x 0.5cm.

On the back of the neck, the ligature mark was 4cm below left ear lobe. Just above the ligature mark on the left side, there was a small horizontal abrasion measuring 2 x 0.5cm.

On the back of the neck, the ligature mark was faint and showed discontinuity on the left back and measured 3.0cm.

He concluded that the deceased died from the wounds inflicted on the back of his chest and the back of his neck caused by a sharp object. He could have succumbed to the injury caused by the ligature on his neck.

He had observed that the upper limbs of the deceased had been tied with a yellow and red fibre string at the wrists front-wise.

On the body of Juriyah (also known as Sariyah), he found the following injuries:

(1) Stab wound in the left eye passing through the lower conjunctiva to the floor of the globe causing fracture of floor of orbit.

(2) (a) Superficial laceration on the right side of the face, 1cm from right alar nasi, measuring 1.5 x 0.3cm.

(b) Laceration on the scalp at back of right temporal region on the head measuring 4 x 5cm.

(3) Stab wound irregular in shape on right ear lobe having abraded margin measuring 2 x 0.3cm with a depth of 2.5cm directed inwards.

(4) Bruise on left side of face near zygomatic prominence, measuring 3 x 2cm.

(5) Two bruises on the chin, one slightly on the right near midline measuring 4 x 3cm and the other on the left side and showed abrasion on its surface, measuring 3.5 x 3.0cm.

(6) Superficial abrasion on the right side of the jaw covering an area of 4 x 4cm.

(7) Linear abrasion on the right front of the neck almost horizontal in position measuring 5 x 0.2cm.

(8) Stab wound on left side of the jaw near the angle, elliptical in shape almost horizontal measuring 2 x 0.8cm directed inwards with a depth of 5cm.

(9) Stab wound on left side of the neck, slightly horizontal and showed abrasion on its margin, particularly the upper margin measuring 2 x 0.6cm. The wound was directed inwards with a depth of 2.2cm and severed the left carotid artery.

(10) Stab wound on the left front of neck, elliptical shape, oblique in position and 2.0cm above left clavicle measuring 1.8 x 0.6cm directed slightly upwards causing a depth of 2.5cm.

(11) Stab wound on left upper chest, almost vertical, elliptical in shape and showed abraded margin, 2.2 x 0.6cm directed inwards with a depth of 2.0cm. The wound was just below left clavicle, 2cm from midline and stop at rib bone.

(12) Stab wound with irregular margin on left side of chest, 1 cm below lateral wound margin No 11 and 3.0cm below left clavicle. The wound was in horizontal position and showed abraded margin. The wound extended to second intercostal space and cut the apex of the left lung.

(13) Stab wound on the left chest almost verticle in position, 1. cm from midline and 2cm below wound No 11. The wound measured 2.2 x 0.6cm directed inwards forming a depth of 2cm.

(14) Stab wound on right upper chest 2cm below right clavicle, elliptical in shape with abraded margin, almost verticle in position measuring 2 x 1cm inwards forming a depth of 2cm.

(15) Triangular shaped stab wound on right chest just 4.5cm below and medial to wound No 14. The wound extended to the chest cavity through the third intercostal space and causing fracture of the adjacent ribs. The wound then cut through the medial part of right midzone.

(16) Stab wound on lateral part of right shoulder, vertical in position, elliptical in shape and showed abraded margin. The wound measured 4 x 1cm directed inwards to the left, forming a depth of 3.5cm.

(17) Two parallel linear abrasion near biceps region 2.3cm apart and 4.0cm in length, oblique in position. The wound was 4.0cm from right cubital fossa.

(18) Two small parallel linear abrasion, 3cm above wound number 7, 1cm apart and 1cm long.

(19) Laceration with abraded margin on ulnar aspect of right midforearm measuring 4.1 x 1cm forming a depth of 3cm.

(20) Laceration on flexor aspect of right forearm 9.5 cm from right cubital fossa. The laceration showed abraded margin measuring 1.5 x 0.6cm forming a depth of 0.5cm.

(21) Horizontal laceration on right forearm, 1 cm distal of wound No 20. The wound had irregular margin measuring 3 x 1cm.

(22) Small abrasion on flexor aspect of right forearm, 2cm from wound No 21 measuring 1 x 5cm.

He concluded that the most fatal wounds were those that caused injury to the carotid vessels in the neck and the stab wounds on the chest causing the injuries to the lungs.

A red and yellow string was found loosely looped around the neck and face of the deceased.

The post-mortem on the fourth body, that of the watchman Balakrishnan was performed on 14 March 1998. The following injuries were found:

(1) Abrasion on right side of the forehead 1.5cm above right eyebrow measuring 1.5 x 0.6cm.

(2) Abrasion below and lateral to left eye measuring 3 x 2cm. The left eye was slightly swollen.

(3) Stab wound on back of left chest elliptical in shape, vertical position, 4.5cm from midline 9cm from nape of neck measuring 2 x 0.6cm. The wound was directed inwards perpendicular to the skin surface forming a depth of 7.5cm entering the chest cavity through left third intercostal space at posterior angle.

(4) Stab wound on back of chest near midline, elliptical in shape, vertical position, 7.5cm from nape of neck measuring 1.8 x 0.5cm.

(5) Small stab wound on back of left chest 3 cm below wound No 3 and 3.5cm from midline measuring 1 x 0.3cm forming a depth of 3cm.

(6) Stab wound on back of chest near midline 7 cm below wound No 4 and 1.5cm below nape of neck measuring 1.8 x 0.5cm, elliptical in shape vertical in position. The wound was directed inwards forming a depth of 2.0cm.

(7) There were multiple post mortem abrasions on back of right arm (apt bite abrasion).

He concluded that the deceased's death was brought about by the four stab wounds on the back of his chest, the most fatal of which was the third.

Specific observation of the forensic pathologist

The forensic pathologist made an important observation that provides the prosecution with the nexus to inculpate the first and second accused with the killings which I shall revert to later in this judgment. He had observed that the upper and lower limbs of Balakrishnan were tied together with red and yellow fibre strings which are similar to the string used to tie the hands of the boy Sathian and to the one which was found loosely looped around the neck and face of the maid Juriah.

The strings were exhibited collectively as exh P31A. They could be seen in the photographs exh P49 (3 and 4), exh P45 (33) and exh P45 (36 and 43) respectively.

He was of the opinion that all the stab wounds found on the four bodies were caused by a sharp object which could be the blood-stained blade from a scissors recovered in the house.

The law on murder — s 300 of the Penal Code

To set the bearing right, it may be appropriate at this early stage that I set out the law of murder in its bare form as it applies here in our jurisdiction.

Under the English common law the accepted definition of murder as laid down by Lord Hale (3 Inst 47) and modified later to conform with changes made by statute and decisions of the courts is as follows:

> Subject to three exceptions, the crime of murder is committed where a person of sound mind and discretion kills any reasonable creature in being and under the Queen's peace with intent to kill or cause grievous bodily harm.

The three exceptions relate to offences where the offence was committed by reason of the doer having been provoked, suffering from diminished responsibility or having entered into a suicide pact, the effect in each case of which would reduce the offence of murder to manslaughter. (See *Archbold — Criminal Pleading, Evidence and Practice 1998* at 19-1)

Under our Penal Code however, the offence of murder is more clearly defined by the two complementary provisions of ss 299 and 300.

Section 299 provides that: ' Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide'.

Section 300 provides that, 'Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the death is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such an act without any excuse for incurring the risk of causing death, or such injury as aforesaid.'

It follows that to substantiate its case the prosecution must prove in respect of each charge:

(i) that the death had been caused by, or in consequence of the act of the accused; and

(ii) that the act was done with the common intention of all the accused to cause the death.

Having stated the law, I shall now proceed to consider the case for the prosecution.

Evidence — the case for the prosecution

No one saw any of the accused causing the death of any of the victims. The case for the prosecution in so far as the actual acts of killings in all the four cases are concerned, therefore, rests entirely on circumstantial evidence.

But as against the first and second accused it was compelling. It was sufficient in my judgment for reasons which I shall describe later, to establish a prima facie case against them.

As for the third accused however, the evidence was clearly lacking to inculpate him with the killings in any of the four charges. The fact that he had rented the hotel room and hired the car Registration No PCV 7944 together with the second accused and, the fact that the car was seen at scene of crime one and a half hours afterwards were in my judgment, insufficient to constitute proof of his involvement in the murders with or without the common intention of the first and second accused. They were at most mere suspicions that he may have committed the murders. To quote Edgar Joseph Jr SCJ in *PP v Lin Lian Chen* [1992] 2 MLJ 561 at p 568:

> It goes without saying that such evidence, which amounts to nothing more than grave suspicion, is totally inadequate ... . Accordingly, on this ground alone, the learned judge was perfectly entitled to rule, at the close of the case for the prosecution, that the respondent had no case to answer and to acquit and discharge him.

It follows therefore, I must at this stage acquit the third accused.

Exactly how the police traced the accused as the perpetrators of the murders was not revealed in the evidence before me. As it transpired, by 13 March 1998, barely a day after the killings were discovered the accused were arrested. After their arrests the accused were put through very strenous interrogations. Cautioned statements which were allegedly inculpatory were recorded from each of them which unfortunately as stated earlier had to be rejected despite the many days of voir dire spent on them.

But the first and the second accused also gave information which led to the discovery of the body of the victim in the fourth charge, the watchman Balakrishnan a/l Mania at the North–South Expressway and some if not all of the jewellery that was taken from the safe of the jewellery shop which in my judgment could be safely admitted into evidence under s 27 of the Evidence Act 1950.

I shall now describe in detail the facts that led to the discovery of the body and the jewellery which I accept as forming the very core of evidence that establishes the case for the prosecution against the first and the second

accused in respect of all the four charges and shall state my reasons for doing so. A

Information provided by the first accused

After the first accused was arrested at the hotel at 12.45pm, he was interrogated by three police detectives — Lance Corporal Jegathesan (PW 16), Detective Sgt Ramasamy and Det Corporal Subramaniam. They started interrogating the first accused at 4.25pm on 13 March 98 and continued on until 10.20pm when they decided to hand him over to Inspector Bubagaran (PW15) who then conducted further interrogation on him alone in the Inspector's room in the Tamil language. B C

In the course of the interrogation the accused told the Inspector that he had thrown a body which he could show to him in the following words: 'Saya mayat buang — tempat boleh saya tunjukkan' in Tamil whereupon the Inspector immediately proceeded to record it down in the form of a police report (exh P 87). Upon receiving instruction from his superior ACP Abu Bakar, the Ketua Siasatan Jenayah Perak, he and the three police detectives mentioned earlier, went to the place under the accused's direction in a police Proton Wira at the 292.4km of the North-South Toll Highway. D

Upon reaching the place at 11.55pm the first accused, the Inspector and two detectives, Subramaniam and Jegathesan got down from the car, leaving Ramasamy and the driver in the car. The accused then led them to the left side of the highway as one faces KL to a spot just five metres from the place where the car had stopped. Accused pointed to a slope down the highway from where he stood. From where he was standing the Inspector could see what appeared to him to be a big package down the slope. He approached the object and found that it was not a package but a body of a male person in a sitting position which was later ascertained to be that of the watchman Balakrishnan. E F

Information provided by the second accused G

The second accused was interrogated by ASP Ravinder (PW14) on 15 March 1998. He was brought out of the police lock-up where he was detained after his arrest, at about 2pm by Corporal Yussof and Det Lance Corporal Kamal. They brought him to ASP Ravinder's office at A-Team. Here at 4pm ASP Ravinder together with Insp Raguraman (PW29) and Sgt Subramaniam (PW30) and Lance Corporal Raja interrogated him. At about 11pm he finally yielded and gave the ASP the information which the latter recorded on a piece of paper (exh P103): H

The accused spoke in Tamil, a language which Insp Raguraman was familiar with. He translated it into Malay to ASP Ravinder. I

> 'Saya setuju tunjukan barang kemas yang kami ambil dari kedai emas itu. Saya ada sembunyikan dalam satu beg di tempat buang grenade Ulu Kinta.'

ASP Ravinder then asked the accused to sign on this piece of paper which the latter duly complied. He and Insp Raguraman then both signed on the paper. After receiving the information ASP Ravinder called for a police van and proceeded to the place mentioned, led by the accused and accompanied by Insp Raguraman, the two police detectives, Subramaniam and Raja, Inspector Azli (PW21), Corporal Yussof, Detective Lance Corporal Kamal and a photographer Lance Corporal Syed (PW23).

They arrived at the place as described by the second accused which was inside the area belonging to the Police Field Force Ulu Kinta. The police vehicle under the guidance of the second accused stopped at a gate which was locked. But the place could be accessed from an opening at the left side of the gate. The second accused got down from the vehicle and led ASP Ravinder and his party to a spot about 10 metres from the gate. He pointed to a tree below a slight slope to his right and said to Inspector Raguraman in Tamil that the jewellery was at the bottom of the big tree. ASP Ravinder then directed Sgt Maniam to go down to the tree to look for the jewellery. Sgt Manian descended the slope to the tree and upon flipping through some leaves at the bottom of the tree, found a bag (exh P102) containing the jewellery (exh P96 to 99). Photographs of the bag and the tree were taken by the photographer in the police party. The bag containing the jewellery was brought up by Sgt Maniam and handed over to ASP Ravinder. Later, the ASP lodged a police report exh P104 of the discovery.

On the next day at 2.30pm, the items of jewellery were identified by the owner of Chitra Jewelley, Nalliah s/o Periasamy (PW26) as those stolen from his shop. He was able to identify them from the tags on some of the items which he and his deceased wife had personally written on. He was also able to identify in respect those items without tags, from the tiny stamped initials of the suppliers and also from the designs of the items which he claimed were exclusively his.

Whether the information had in fact been given

Strenuous cross-examination was conducted in respect of the information leading to the discovery of the body and the jewellery by counsel for the accused particularly by Mr Ajit Singh which centered mainly on the veracity of the police personnel to whom the information were given and the legal aspect of their admissions.

I shall deal first with the veracity of the police officers as receivers of the information.

It was submitted by the defence that both Inspector Bubargaran and ASP Ravinder were not witnesses of truth and that there was a strong probability that the accused had not actually given the information and that the police already knew of the existence of the body and the jewellery in which event both the body and the jewellery were not discovered but merely recovered by the police. Counsel drew my attention to the observation and advice of Azmi J (as he then was) in *PP v Liew Sam Seong* [1982] 1 MLJ 223 wherein the following passage from *Sarkar on Evidence* (12 Ed) at p 287 on

the subject of misuse of s 27 by the police was cited with approval by his lordship at p 224:

> Section 27 has frequently been misused by the police and courts should be vigilant about the circumvention of its provisions ... . When a fact is once discovered from information received from another source, there can be no discovery again even if any information relating thereto is subsequently extracted from the accused. A device sometimes adopted by the police is to stage a scene and take the accused to the place where the things discovered laid buried or hidden and require him to make a search for them at the spot indicated to the accused... It has been observed that it has become a normal device of the investigating agency to turn an ordinary recovery into a discovery in order to utilise the provisions of s 27 (*Amin v SA* 1958 A 293 at p 300).

In respect of the information given by the first accused, it was submitted that he had been interrogated by the three police detectives from 4.25pm until 10.20pm and had not up to that stage yielded to giving anything incriminating. Was Inspector Bubargaran to be believed when he said that the accused gave him the information about the body only after barely 25 minutes of further interrogation by him? Further, it was submitted that the detectives, contrary to what they claimed in their evidence, had not in fact interrogated the accused at all — as the entries No 3027 and No 3032 in the station dairy (exh DT 7) clearly indicated that at the material time they were not at the place of interrogation having according to the entries, accompanied Inspector Bubargaran to ambush and arrest another suspect one Ramjan a/l Yusof at Jalan Sungai Pari.

Further, it was submitted that entry No 3024 and entry 3025 had stated that all the personnels of the division D7 to which the Inspector and the detectives belonged were attending a briefing at the same Bilik Gerakan where they had claimed the accused were interrogated. How then could there be an interrogation at the Bilik Gerakan when a meeting of the whole division had been held there? As entries in any official dairy of a police station must always state the truth, it was submitted that the detectives were therefore telling demonstrable lies in court.

It was also submitted that the identification of the jewellery by the owner Nalliah was not conclusive. No steps were taken to weigh the jewellery after they were recovered and that by merely looking at the jewellery and saying it had come from his shop was not enough as the jewellery may appear to be similar but they maybe of different weight and therefore may not have belonged to him.

Further it was submitted that the words in the notes exh P103 'ambil' was inconsistent with the word 'samun' in the police report exh P104 and ASP Ravinder himself had admitted that the word 'disamun' in the report was never said by the second accused to him. Also the words in the report exh P104 'tempat emas yang disorok selepas disamun oleh mereka bertiga' was not stated in the notes exh P103. The inconsistency, it was submitted gave rise to the probability that the second accused had never given any such information to ASP Ravinder.

A In any case, it was argued that the words 'yang kami ambil dari kedai emas itu' in the notes should not be admitted as it did not relate distinctly to the discovery of the jewellery being an information of the 'past history' of the jewellery which did not satisfy the requirement mentioned in *Pulukury Kotayya v King Emperor* (1947) 74 IA 65 at p 77.

B I shall deal with this aspect of the submission shortly in this judgment.

Finally, the two sets of information, it was submitted, were obtained in an oppressive manner, both the accused having been vigorously interrogated for long hours and in the case of the second accused in contravention of the Lockup Rules having been interrogated even on a Sunday and well past the time of 6.30pm. In due fairness to both the C accused the court, it was argued, should follow the principle enunciated in the recent Federal Court case of *Goi Ching Ang v PP* [1999] 1 MLJ 507 not to admit the two sets of information.

Evaluation — the evidence of the discovery

D For convenience, I shall begin by considering the last point raised in the submission with respect to whether the two sets of information should be rejected on the ground that they had been obtained from the accused by oppression.

The case of *Goi Ching Ang* has now settled the issue whether an E information deposed to by an accused person under s 27 of the Evidence Act 1950 is subjected to the test of voluntariness under s 24 of the Evidence Act 1950 as decided in the earlier case of *Md Desa bin Hashim v PP* [1995] 3 MLJ 350.

Speaking for the panel of five judges of the Federal Court, Chong Siew F Fai CJ (Sabah & Sarawak) said at pp 520–521:

> Prior to *Md Desa*, the Malaysian courts had persistently held to the effect that s 27 was not subject to s 24 of the Act. Once the information is proved to be within the province of s 27, the trial court would admit it in evidence notwithstanding that the information might not have been given voluntarily

G And at p 524, by the following words overruled *Md Desa*:

> Indeed, we are in complete agreement, as a matter of policy, with the view expressed in the judgement of this court in *Md Desa*, of the desirability as to the voluntariness of s 27 information. However, due to lack of language-nexus between s 27 on the one hand and s 24 and comparable provisions in other H enactments on the other hand, the apparent intention of the legislature, and the long line of past decisions of our courts not a few of which were from eminent members of the appellate and the highest courts, any departure from the entrenched judicial interpretation laid down in the above quoted and other numerous cases would be a policy decision and should, in our view, be left to the legislature.

I But whereas *Md Desa* had ruled that all such information must be subjected to the stringent test of voluntariness as would be required for cautioned statements, *Goi Ching Ang* puts its admission in the discretion of the trial

judge exercisable in the manner as described in the following passage at pp 526 and 527: A

> There is a vested discretion in a trial judge to exclude evidence which is prejudicial to an accused even though the said evidence may be technically admissible. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining s 27 information are scrupulously followed. B

However, while the Federal Court was minded to leave it to the discretion of the trial judge whether to exclude any evidence that may have been obtained improperly from the accused, no yardstick was prescribed to enable the judge to decide when such evidence should be excluded. However the law is clear that where the presiding judge is vested with a discretion whether to admit or not to admit any evidence, he is bound to exercise his discretion by applying the test whether the prejudicial effect of its admission would outweigh its probative value. This common law principle was restated in *PP v Paneerselvan & Ors* [1991] 1 MLJ 106 where at p 108, Edgar Joseph Jr J said: C D

> I am satisfied therefore that the prosecution have adduced sufficient prima facie evidence, at this stage, to satisfy the conditions laid down in s 157 so that technically the statements are admissible. The matter however does not rest there for once it is accepted that the evidence objected to is relevant and admissible, then it is for the judge to exercise his discretion and reach a fair balance having regard to the interests of both the prosecution and the defence. In other words, I must next consider whether in the exercise of my discretion I should exclude the statements as corroboration under s 157 on the ground that their probative value is outweighed by its prejudicial effect in accordance with the principles enunciated by Lord du Parcq in the Privy Council case of *Noor Mohamed v R* [1949] AC 182 followed. In that case Lord du Parcq said: E F
>
> > '...in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.' G H

Far from being of trifling weight, the two sets of information provided by the respective accused in the instant case were of enormous value to the prosecution whose case may stand or fall by them. Their probative value certainly outweighs their prejudicial effect. There is in my judgment therefore no valid ground to reject them on the basis that they may not have been given voluntarily by the respective accused. I

In any case, I could not find any evidence of any form of oppression beyond that which was reasonably expected and required by the police to obtain information to find the killers of the four persons. Both the Inspector and the ASP had denied under cross-examination that the two accused were assaulted while they were being interrogated. It is true the interrogations were carried out by a team of officers over long hours, but I would not consider them oppressive as they were each interrogated only on one occasion — in the case of the first accused on 13 March 1998 from 4.10pm to 10.25pm and in the case of the second accused on 15 March 1998 from 2.00pm to 11.00pm. The objective of an interrogation is to find the doer of a criminal act and is very much a legitimate aspect of our criminal justice system. How else could the police obtain information from a suspect?

Having heard the evidence of the police personnels and the officers who received the two sets of information, Inspector Bubagaran and ASP Ravinder Singh, and the submissions of counsel for the accused and the learned Deputy Public Prosecutor, I am convinced that there is no ground to disallow their admission under s 27 of the Evidence Act 1950. I am satisfied at this stage of the trial that they are reliable for the following reasons:

Firstly, although the entries in the station dairy of the D-Team had been falsified to show the three police detectives were at a different place when they were supposed to be interrogating the first accused, both Insp Bubagaran, and Jegathesan (the person who made the entry 3027 and entry 3032) had admitted that the entry was entered that way to show team participation in order to gain merits in the detective journal. What actually transpired it was explained, was that only the Inspector had gone to Sg Pari to arrest the suspect. The detectives had stayed behind at the Bilik Gerakan and were in fact interrogating the first accused there from 4.25pm to 10.20pm. They had also explained that the purpose of false entries was to gain some recognition in the Detective Journal for all the three of them rather than for only the Inspector as they worked as a team. I accept their explanation.

As for entries 3024 and 3025, an explanation was given by ASP Mohd Zaidon (PW18) that the meeting of all the officers and personnel of his division D-7 had in fact taken place at his office and that the Inspector and the three detectives were excused from the attendance to enable them to continue with their interrogation of the accused at the Bilik Gerakan. He said Ramasamy had asked his permission for Inspector Bubagaran and the three of them to be excused from attending the meeting as they and Inspector Buba for the reason that they were conducting interrogation in a murder case, and that he had agreed. ASP Mohd Zaidon's evidence therefore confirms not only that interrogation of the first accused did take place but also that the three police detectives did interrogate him at the Bilik Gerakan.

Secondly, I could find no such evidence that the police had already known of the existence of the body at the 292.4 km of the North-South Toll Highway and the jewellery at the tree at the Police Field Force area in Ulu

Kinta, to support the contention that the body and the jewellery were recovered and not discovered and therefore could not qualify for admission under s 27.

Inspector Bubagaran who arrived at the place with his police party under the guidance of the first accused said that when his party arrived, no other persons were there. His evidence was corroborated by the evidence of the other members of his party and by ASP Ravinder who arrived later with another police party after being informed by Insp Bubagaran by handphone that the body had been found.

Further, the ASP as the investigation officer, had in the face of strenuous cross-examination creditably denied that the police had known of the existence of the body and the jewellery.

Thirdly, the fact that there were some differences between the words used in the police report and the notes written down by the ASP were only to be expected. They were two different documents, the police report being merely to serve the purpose of verifying the fact that the accused had given the information in the form of the notes. There is no reason to suspect that that the notes relating to the discovery had been falsified as the accused himself had signed on the notes.

Having accepted the two sets of information as reliable, and properly given, the next step that I have to undertake is to consider the extent to which they could be applied in favour of the prosecution.

The law — scope of s 27 of the Evidence Act 1950

Section 27 of the Evidence Act 1950, reads as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

In order that the law relating to the admission of information leading to discovery may be properly understood and correctly applied, reference must now be made to the former Supreme Court case of *Wai Chan Leong v PP* [1989] 3 MLJ 356 which defines the scope of s 27 of the Evidence Act 1950. Speaking for the panel Gunn Chit Tuan SCJ said at p 358:

> ... we would take this opportunity to repeat and to add a few words to what has been said about the latter section in other cases decided previously including those cited to us. Firstly, as s 27 is an exception to the prohibition imposed by the preceding ss 24, 25 and 26 of the Evidence Act, it should be strictly construed and applied. Secondly, it must be borne in mind that for s 27 of the Evidence Act to apply, the information must be such as has caused discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered (*Chong Soon Koy v PP*; *Pulukury Kotayya v King Emperor*).

A The expression 'fact' is defined in s 3 of the Evidence Act as follows:

'fact' means and includes —

(a) anything, state of things or relation of things capable of being perceived by the senses;

(b) any mental condition of which any person is conscious;

B As pointed out by Suffian LP (as he then was) in *Chong Soon Koy v PP*, their Lordships of the Privy Council in *Pulukury Kotayya v King Emperor* had observed that 'it is fallacious to treat 'fact discovered' within s 27 as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the C information given must relate distinctly to this fact.'

It must also be observed that the legislature has used the expression 'information' in s 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. Although that expression is not defined in the Evidence Act, unlike a statement, it includes knowledge derived by the person informed by the accused as well as the means taken to impart that D knowledge.

The former Federal Court case of *Chong Soon Koy v PP* [1977] 2 MLJ 78 referred to in the above judgment defines the limit to which an information under s 27 of the Evidence Act 1950 can be admitted into evidence.

In that case, while his statement was being recorded by one Mr Ong a E Special Branch officer, the accused gave an 'information with regard to a firearm and some ammunition which he had hidden in the Berapit Hills in Bukit Mertajam'. The accused then led the officer and his party to the place where the firearm and ammunition were discovered. The officer described the sequence of event which led subsequently to the discovery in the F following words at p 79:

The whole party trekked up hilly terrain for about an hour in single file, with accused leading the way. After an hour accused stopped and pointed to a spot which was sort of cavern formed by boulders ... Inside the cavern accused pointed to a spot where I saw a slab of thin granite of 1.5 ft diameter oval. Underneath this granite was a black plastic container ... I directed accused to G carry this out of the cavern to open space outside. From this plastic container, accused took out two ammunition boxes ... The accused opened one of the two containers. Inside were two packages. In one package there was an automatic Llama Special (P3 identified) and two magazines (P4 A and B identified) ... in [another package] were 37 rounds of .32 ammunition (P7 and P6 identified) ... .

H Suffian LP, of the former Federal Court proceeded to justify the admission of so much of the information that led to the discovery of the firearms and ammunition as evidence in the following words at p 79:

What was the fact discovered? The fact discovered embraces the place from which the pistol and ammunition were produced and the knowledge of the I accused as to this. What was the information supplied by the accused relating distinctly to the fact thereby discovered? It was 'information with regard to a firearm and some ammunition which he had hidden in the Berapit Hills in

Bukit Mertajam' in the words of Mr Ong. All that evidence is admissible, since in the words of the Privy Council at p 77 in *Pulukury Kotayya v King Emperor* 74 IA 65, a decision on the equivalent section of the Indian Evidence Act:

> '... In their Lordships' view, it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A.' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.'

In view of the above authority all the evidence of Mr Ong's which we have reproduced is admissible and that evidence alone, apart from the cautioned statement, is enough to justify the verdict arrived at by the learned trial judge.

The ratio in *Chong Soon Koy* was followed in the Supreme Court case of *Wai Chan Leong v PP* [1989] 3 MLJ 356. In that case, the accused was arrested when some drugs was found in his trouser pocket. On being interrogated, he told a police Inspector:

> Saya ada simpan lagi 'pek hoon' dalam rumah saya sewa punya — Taman Midah — boleh tunjuk sekarang.

He then led the Inspector and his party to a room in the house where he gave further information in the following words:

> Itu 'pek-hoon' ada sana, beg punya dalam.

The drugs was discovered in that bag as a result. Gunn Chit Tuan SCJ speaking for the panel and relying on *Chong Soon Koy*, ruled that words spoken by the accused were in fact the information supplied to the police and that the High Court was correct to admit them into evidence.

To determine the extent to which the two sets of information can be admitted into evidence one has to fall back to the principle in *Chong Soon Koy*, to ask the two questions formulated therein by Suffian LP:

(a) What was the fact discovered?

(b) What was the information supplied by the accused relating distinctly to the facts thereby discovered ?

In respect of the first accused, the fact discovered embraces the place from where the body was discovered and his knowledge about it, and the information supplied that relates distinctly to the facts discovered was that he had thrown it there.

In respect of the second accused, it embraces the place from where the jewellery was discovered and his knowledge of it and the information supplied that relates distinctly to the facts was that he had hidden it there.

It follows that the statements cannot be admitted wholesale. As submitted by the defence earlier the information provided by the second accused, 'yang kami ambil dari kedai itu' would have to be excluded for the reason that it does not relate distinctly to the discovery of the jewellery but relates to a past event.

Having determined the extent of the admissibility of the information deposed by the respective accused under s 27 of the Evidence Act 1950, the next task is to consider the presumptions that could legitimately be drawn therefrom. But before doing so, it is necessary for better understanding and effects, to first consider the law relating to presumptions which have to be drawn on these information.

The law on presumptions

By themselves the information were incapable of inculpating the accused with the charges. But in assessing the case for the prosecution the court is obliged to apply deductive reasoning to draw such inferences or to arrive at such factual presumptions as necessary from these information. The power to do so has always been an integral tool of trade of a court of law. Nevertheless, in our jurisdiction the power has been written into our law of evidence in the form of s 114 of the Evidence Act 1950 which provides as follows:

> Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the stolen goods knowing them to be stolen, unless he can account for his possession; ... .

The instances which the court may draw such presumptions are inexhaustive. There is no precedent here in our jurisdiction where a presumption under the main section of s 114 is drawn in a case falling within the factual matrix of this trial, although there is one where a presumption had been drawn under the provision of illustration (a) to which I shall revert to later in this judgment.

To provide the necessary persuasive authority to make my point therefore, I have to rely on a series of Indian authorities with respect to their interpretation of s 114 of the Indian Evidence Act 1872 which is in para-material with the same section of our own Evidence Act 1950.

In *Re Madugula Jermiah* 1957 AIR Andhra Pradesh 611 (Subra Rao CJ and Bhimasankaram J) the Supreme Court of India said that: A

> Section 114 deals with presumptions of fact. The section enables a judge to infer one fact from the existence of another proved fact having regard to the common course of natural events or human conduct. The illustrations given to the section are not exhaustive. The court may always rely on the main section in regard to a different set of acts or combination of acts to draw the presumption embodied in that section. As the section only enables a rule of guidance evolved out of human experience, it gives as option to the judge whether to draw such a presumption or not having regard to the circumstances of each case. B

Having said this the Supreme Court went on to hold that: C

> It is an established rule that, if murder and robbery form parts of the same transaction, a presumption may be drawn against the accused for murder if he is found to be in possession of the jewels worn by the deceased in the absence of a reasonable explanation by him.

The ruling was however predicated by a strong caution, for the court went on to say: D

> But as the presumption is one of fact, great care must be taken before drawing a presumption particularly in the case of a serious offence on slander material for it would be a leap in the dark with disastrous consequences. Unless, therefore, some definite fact connecting the accused with the murder is established, the courts should be chary to draw the presumption of murder from the mere fact of possession of the articles worn or in the possession of the deceased. E

The rationale for drawing such a presumption however was explained in another case — in the judgment of Devadoss J (in a panel of three) in the Madras High Court case of *Sogaimuthu Padayachi v King Emperor* ILR 50 Mad 274 (AIR 1926 Mad 638) where he said: F

> If a person who retires to bed in a normal state of health is found next morning lying dead and his safe rifled and his valuables stolen and if it comes to light that the man did not die a natural death, but was murdered and that if the property which was in the safe shortly before the murder is found in the possession of persons who are unable to account for them the jury is entitled to draw the inference and the law requires them to draw the inference that the persons in possession of such property are not only the thieves but also murderers. If the persons with whom the stolen property is found have an explanation to offer which explanation if accepted would prove them to be innocent, it is for them to offer it. G H

Another Indian case of high authority that may serve to illustrate the point further is *Wasim Khan v State of Uttar Pradesh* [1956] SCR 191. In that case, the deceased, a shopkeeper had gone to Lucknow to purchase goods for his shop. Having purchased the goods, on the return journey he engaged the appellant to carry the goods from the railway station to his village of Jarwal by using the appellant's cart. Along with the deceased two other persons also got on the cart. I

A The cart and the goods did not reach Jarwal which was situated some distance away from the railway station. The body of the deceased was found near a bridge the next morning. On the fourth day of the occurence, following police interrogation, the appellant hand over the personal belongings including the goods of the deceased to the police. In his defence the appellant had explained that three men had come to look for the B deceased at the bridge. The deceased had gone off with them and had asked the appellant to wait for him at the bridge. When the deceased did not turn up he decided to take the goods back to his house, and had eventually handed them over to the police.

The Sessions Court of Bahraich rejected his explanation and convicted C the appellant. On appeal the High Court of Allahabad upheld the conviction. Upon further appeal the Supreme Court of India (comprising of BP Sinha, Jafer Imam and Chandrasekhara Aiyar JJ) dismissed the appeal. It ruled that:

> Possession of recent and unexplained possession of the stolen property while D it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder.

In making the ruling, Imam J writing for their Lordships of the Supreme Court, reviewed a number of Indian authorities. For the persuasive value that they carry, I propose to reproduce them in this judgment to illustrate the legitimacy to which the presumption under s 114 of the Evidence Act E 1950 can be drawn against an accused who is found in possession of the belongings of a deceased victim — a fortiorari, where the accused is found with the corpus of the deceased.

In *The Emperor v Sheik Neamatulla* (1913) 17 CWN 1077 the accused was found to be in possession of stolen property belonging to a deceased. F Sir Lawrence Jenkins J in that case after referring to s 114 of the Indian Evidence Act, approved the following passage from *Wills on Circumstantial Evidence*:

> The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which had been G connected with theft. This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognised.

In dealing with a similar factual situation in *Queen-Empress v Sami and Anor* (1890) ILR 13 Mad 426, the learned judges of the High Court observed H that:

> Under these circumstances, and in the absence of any explanation, the presumption arises that anyone who took part in a robbery also took part in the murder. In cases in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence I against the prisoner against the charge of robbery would similarly be evidence against him on a charge of murder. All the facts which tell against the appellant, especially his conduct indicating a consciousness of guilt, point

> equally to the conclusion that he was guilty as well of the murder as of the robbery ... .

In *Emperor v Chintamoni Shahu* AIR 1930 Cal 379, the same opinion was expressed by the High Court that:

> The possession of stolen goods recently after the loss of them may be indicative not merely of the offence of larceny or of receiving with guilty knowledge but of any other more aggravated crime which has been connected with theft; this particular fact of presumption forms also a material element of evidence in the case of murder.

In fairness to the defence, I must pause here to recall the former Court of Appeal case of *Abdullah bin Saad v PP* [1956] MLJ 92 wherein it was held that a presumption in respect of the possession of stolen goods under illustration (a) (as opposed to drawing a presumption under the main provision) of s 114 of the Evidence Act 1950 had not been made out.

In that case the deceased met his death on 15 May 1955. It was proved that on 16 May 1955 the appellant pawned some jewellery which belonged to the deceased. Apart from this piece of evidence, there was nothing to connect the appellant with the crime. Nevertheless the High Court convicted him of murder. On appeal, the Court of Appeal (Mathew CJ delivering the judgement of the court) held that this did not provide sufficient evidence on which to found a conviction for murder as it was not certain that the jewellery were on the deceased's person on the day of his death. The appeal was allowed and the conviction was set aside.

The *Abdullah bin Saad* case was applied by Mohamed Azmi SCJ later in the Supreme Court case of *Ng Thian Soong v PP* [1990] 2 MLJ 148 to reinforce the already known principle of caution relating to circumstancial evidence similar to that enunciated in *Re Madugula Jermiah*, wherein at p 150 his lordship said:

> Where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial judge merely to tabulate the indirect evidence. He must go one step further by directing the jury what other reasonable inferences could be drawn from each strand of circumstantial evidence, and leaving it to the jury to decide which inference they wish to adopt. It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at the guilt of the accused.

I must admit that the facts in the Indian court cases are not on all fours with the facts in the present trial. But they serve to demonstrate the legitimacy of drawing presumptions in similar circumstances where the accused are implicated through the production of belongings of persons whom he is accused of killing.

The *Abdullah bin Saad* case on the other hand can be distinguished on the facts. In that case the prosecution did not rely on any information under s 27 of the Evidence Act 1950. It was relying merely on the proof that the jewellery was pawned by the accused thereby leaving open the question of

how he could have come by it. In the instant trial however, the presumptions that may be drawn arose not only from the discovery of the body and the jewellery but also from the information provided by accused themselves.

The presumptions that must be drawn

The presumption that must be drawn against the first accused under s 114 of the Evidence Act 1950 from the fact of the discovery is that he had killed the watchman.

By reason that the same type of strings used to tie the watchman was similar to the ones used to tie up the boy and the maid in the house, and considering that their killings were executed in the same transaction as the killing of the woman, it must be presumed that he had also killed the boy, the maid and the woman at the house.

The presumptions that must be drawn against the second accused under the provision of s 114 of the Evidence Act 1950 are that:

(a) that he was in possession of the jewellery;

(b) that he was the person who stole the jewellery from the locked safe in the shop;

(c) that he had killed the watchman as the stolen jewellery was at that time in the control of the watchman;

(d) that he had also killed the woman in the house as to obtain the jewellery in the shop he must first obtained the key to the safe which had always been in the possession of the woman deceased in the house. This is clear from the evidence of Nalliah the owner of Chitra Jewellery (PW 26) .

(e) that he had also killed the boy and the maid in the house as their killings were in the same transaction.

Common intention — the requirement of s 34 Penal Code

Having drawn the presumptions, it would now be necessary to consider whether on the evidence tendered the element of common intention under s 34 of the Penal Code could be attributed to the accused.

Quite simply, common intention is concerned with the principle of joint liability in penal law the principle of which has been set out in numerous judgments in our jurisdiction. However as illustration, I propose to quote, for the clarity on the law that it propounds, from the recent Singapore Court of Appeal case of *Shaiful Edham bin Adam & Anor v PP* Criminal Appeal No 13 of 1998 Court of Appeal, Singapore (Yong Pung How CJ (Singapore), LP Thean JA, Tan Lee Meng J) as reported in the April 1999 issue of *Mallal's Current Law* at para 289 in the following three passages:

(1) Section 34 of the Penal Code embodied the principle of joint liability being the existence of a common intention. By s 33 the word 'act' denoted a series of omissions as well as a single omission. It followed that

words in s 34 'when a criminal act is done by several persons' could be construed to mean 'when criminal acts are done by several persons'. Thus, where different acts in a criminal enterprise were committed by several participants, such participants could still be regarded as having done 'a criminal act' for the purposes of liability under s 34. The raison d' etre of s 34 was to meet the situation where it was difficult, if not impossible, to distinguish between the acts of each individual member of a party or to prove precisely what part was played by each of them. Section 34 operated to impute liability to a participant whose participation contributed to the result, though he could not be proved to have committed the actus reus himself;

(2) all that was necessary for the prosecution to prove was that there was in existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s 34 of the Penal Code) was committed in furtherance of that criminal act. It was not necessary to prove that there had to be a common intention to commit the crime actually committed;

(3) the rider to this proposition was that the participants must have had some knowledge that an act may be committed which would be consistent with or in furtherance of, the common intention; ... .

It is true that no one saw either of the accused kill any of the victims in any of the four charges either alone or jointly. But no doer of a criminal act committed in stealth as in the present trial, will expose his intention. It follows therefore the common intention in all the four charges must of necessity be gathered from the surrounding circumstances of the case.

The following three factors taken together support the conclusion that the first and second accused were acting with common intention in executing the killings.

Firstly, the nature of the injuries on the bodies (the multiple stab wounds) leaves no doubt that the intention of the perpetrators was to commit murder. Given the fact that there were four killings each with multiple stab wounds, and that three bodies were found in the house at different locations, is highly indicative that the killings were the result of the intentional act of more than one person.

Secondly, the fact that the second accused (together with another person not identified) had rented the hotel room where the first accused was staying during the currency of the incident is highly indicative that they were confederates.

Thirdly, given the fact that any one of the accused can be inculpated alone on his own account, to the killings in the four charges, and given that one had led to the discovery of the body of the watchman and the other to the discovery of the jewellery, and also given that it was clear that their common intention was to rob the shop of the jewellery, I am satisfied that they were in fact acting in concert in executing the killings.

Amendment of the charges necessary

Having come to the finding earlier that only the first and second accused could be inculpated in the charges it follows that the charges must accordingly be amended to exclude the participation of the third accused. There is also a need to amend the time to reflect on the period when the respective killing was alleged to have taken place, as the prosecution has not been able to prove the exact time and place. The charges as amended are as follows:

Pertuduhan Pindaan Pertama

Bahawa kamu bersama-sama pada 12 Mac 1998 antara jam 6.30 petang hingga 6.45 pagi 13 Mac 1998 di rumah No 82, Laluan Tasek Timur 16, Taman Seri Deramawan, Bercham, Ipoh, di dalam daerah Kinta, di dalam Negeri Perak Darul Ridzuan, dengan niat bersama kamu semua telah melakukan bunuh ke atas *Sathian a/l Nalliah* KP: 830223-08-5885. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Kesiksaan dan dibaca bersama di bawah s 34 Kanun yang sama.

Pertuduhan Pindaan Kedua

Bahawa kamu bersama-sama pada 12 Mac 1998 antara jam 6.30 petang hingga jam 6.45 pagi 13 Mac 1998 di rumah No 82, Laluan Tasek Timur 16, Taman Seri Dermawan, Bercham, Ipoh, di dalam daerah Kinta, di dalam Negeri Perak Darul Ridzuan dengan niat bersama kamu semua telah melakukan bunuh ke atas *Virama a/p Subramaniam* KP: 490726-06-5028. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama di bawah s 34 Kanun yang sama.

Pertuduhan Pindaan Ketiga

Bahawa kamu bersama-sama pada 12 Mac 1998 antara 6.30 petang hingga jam 6.45 pagi 13 Mac 1998 di rumah No 82, Laluan Tasek Timur 16, Taman Seri Dermawan, Bercham, Ipoh, di dalam daerah Kinta, di dalam Negeri Perak Darul Ridzuan, dengan niat bersama kamu semua telah melakukan bunuh ke atas *Juriyah* No Paspot Indonesia XA 872162. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama di bawah s 34 Kanun yang sama.

Pertuduhan Pindaan Keempat

Bahawa kamu bersama-sama pada 12 Mac 1998 antara Jam 6.30 petang hingga 11.45 malam 13 Mac 1998 di suatu tempat yang tidak diketahui, dengan niat bersama kamu semua telah melakukan bunuh ke atas *Balakrishnan a/l Mania* KP: 490707-08-5023. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama di bawah s 34 Kanun yang sama.

The finding at the close of the case for the prosecution

In drawing the presumptions described earlier, I am not unmindful of the established principle of law that for circumstantial evidence to be accepted, the facts constituting it must be verified with scrupulous accuracy; that the

facts established must be consistent and consistent only with the accused as the doer of the act he is charged with and should not be susceptible of any rational explanation; and that any inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than of their joint guilt.

I could think of no other inference or presumption that may be legitimately drawn other than those that I mentioned.

I am satisfied at this stage of the proceeding that the multiple wounds inflicted on the respective victim by a sharp object as found by the forensic pathologist in respect of each charge could only lead to one and only one conclusion — that the person who caused them had intended to commit murder. This satisfies the plenary requirement of mens rea of the offence under s 300(a) of the Penal Code. In such a situation intention is a matter of inference as was said by Raja Azlan FJ in former Federal Court case of *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174 at p 176:

> It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.

The above passage was recalled and applied recently by the Court of Appeal in *Sainal Abidin Mading v PP* [1999] 4 MLJ 497 wherein Haidar JCA said:

> The learned judge after considering the nature of the injuries sustained by the deceased, the number of wounds and the weapon used, correctly, in our view, followed what Thompson CJ took regarding the nature of the injuries sustained by the victim as an indicator of intention in *Tan Buck Tee v PP* [1961] MLJ 176, where the learned CJ said at p 179:
>
> > 'There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by voilent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.'

Further, having examined the case for the prosecution closely with regard to the discovery of the body and the jewellery and the facts that relate distinctly to their discovery, I can come to no other finding at this stage of the proceeding, other than the finding that both the accused had acted with common intention to kill all the four victims.

I must accordingly find that the prosecution had made out a prima facie case in respect of each charge as amended and must therefore call upon both the accused to enter their defence on each of the amended charge.

The consequence of remaining silent

The first accused elected to remain silent and not to call any evidence. Following the Federal Court case of *Arulpragrasan v PP* [1997] 1 MLJ 389, I would be duty-bound to convict the first accused forthwith. But the

A decision in *Arulpragrasan* is now no longer good law as s 180 Criminal Procedure Code has since been thoroughly overhauled.

In its present form however, the law is somewhat unsettled as to the next course of action that would have to be taken when an accused elects to remain silent. While requiring that the defence must be called at the close B of the case for the prosecution if the court finds that a prima facie case has been made out, the phrase in the former state 'if unrebutted would warrant his conviction' has been conspiciously left out thereby opening again to interpretation the perenial question of whether the court can convict forthwith an accused who chooses to remain silent after being called to enter his defence.

C

As I understand it, the *Arulpragrasan* case seeks to explain that a 'prima facie case' in the context of the requirement of the former s 180 of the Criminal Procedure Code which contained the phrase 'which unrebutted would warrant his conviction' means simply, sufficiency of evidence at the close of the case for the prosecution. Hence, by reason of the existence of D this phrase, it was clear that the prosecution must prove its case beyond reasonable doubt at the close of the case for the prosecution so as to put itself in a position to convict the accused if he chooses not to call any evidence (that is to say if chose to remain silent) after being called to enter his defence. There would be no further need of re-evaluation of evidence — conviction must follow as matter of course.

E

With the demise of *Arulpragrasan*, personally I am of the view that one may depart from the position adopted in that case to convict an accused who chooses to remain silent forthwith at the close of the case for the prosecution — to re-examine the prosecution's evidence afresh to see if in the final analysis the charge against the accused has been proved beyond F reasonable doubt. For in my considered view, s 180 in its present form (without the phrase 'if unrebutted would warrant his conviction') merely requires the court to decide whether the prosecution has made out a prima facie case at the close of its case. All that the judge needs to do at this stage is to consider whether on the facts presented before him, there is sufficient G evidence to merit the hearing of the defence side of the story. If there is not, the accused would be entitled to an acquittal without having to be called to enter his defence. If on the other hand there is sufficient evidence, the accused would have to be called to enter his defence — and in the event that the accused decides to remain silent it would be incumbent upon the judge to re-evaluate the prosecution's evidence this time with a view to deciding H whether the prosecution has proved its case (as it was obliged to under the law) beyond reasonable doubt.

I am however not at liberty to adopt this approach, for the Court of Appeal in *Lt Kol Yusof bin Abdul Rahman v Kol Annuar bin Md Amin* [1997] 1 MLJ 562 at p 577 had taken the liberty to rule that proving a prima facie I case means in essence proving it to the level of sufficiency that would warrant the conviction of the accused. In the words of Shanker ACJ, speaking for the panel at pp 577–578:

> In summary trials, therefore, establishing a prima facie case is simply just another way of saying that the prosecution evidence at its close must be such as would, *if unrebutted*, warrant the conviction of the accused. However, for the benefit of those who see more in *Haw Tua Tau* than they should, this does not mean that a conviction should automatically follow if the defence is called. That will happen if the defence calls no evidence at all to rebut the prosecution's case, and does nothing before the end of the trial to dissuade the court from the view it has taken. In other words, calling for the defence is not of itself a pronouncement of guilt or a conviction but a ground for proceeding with the next stage of the case when it becomes the accused's obligation to tip the scales of justice back in his favor.
>
> The degree of proof required to establish a prima facie case is easily demonstrated by asking ourselves what the court should do after the defence is called, if the accused elects to remain silent, calls no evidence, and cannot come up with any good reason why the earlier conclusion was wrong, eg by bringing new authorities which take a different view of the law or pointing out some inherent weakness in the prosecution case he may have overlooked earlier. Thus unqualified, and unrebutted the court has to convict on the very same material. Nobody would dare suggest as a matter of prudence that the degree of proof required at this stage is not proof beyond all reasonable doubt. Nobody has yet satisfactorily explained why it should be any different at the close for the case for the prosecution in a summary trial. Each state calls for the decision by the judge or magistrate of a legal issue which only predicates that degree of certainty required by s 3 of the Evidence Act.

The case was decided after the coming into force of the amendment to s 180 of the Code on 31 January 1997 and in the hearing the Court of Appeal was referred to the Bill which contained the amended s 180 which was about to be gazzetted. Although obiter, the case is of very strong persuasive authority on the next step that must be taken when an accused chooses to remain silent upon being called to enter his defence.

I am obliged to follow this judgment. In fact the interpretation had already found favour with Augustine Paul J in the recent case of *Public Prosecutor v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1 wherein at p 64 after an exhaustive analysis he concluded that:

> a prima facie case as prescribed by the new s 180(1) of the Criminal Procedure Code must mean a case which unrebutted would warrant a conviction.

Having decided that the prosecution had proved a prima facie case against him and having called the first accused to enter his defence following which he has elected to remain silent and not to call any evidence, I must now find the accused guilty and convict him on all the four charges as amended and in accordance with the provision of s 277 direct that he be hanged by the neck till he is dead.

Defence of the second accused:

Having been offered the three alternatives, the second accused chose to give evidence on oath. His testimony was short and brief.

A This was what he said:

The first accused was his brother-in-law and the third accused was his business associate.

He had rented the Car Registration No PCV 7749 on 12 March 1998 B for the purpose of using it to travel to Kuala Lumpur. The other car Registration No ACQ 4222 which he had rented earlier was being used by the first and third accused.

On 13 March 1998 between the hours of 1 to 1.30 am he was travelling in the car Registration No PCV 7749 together with the first accused C Krishna Rao and the third accused Kumaresan. The first accused was driving the car.

They were passing by Jalan Lahat after having their meals at a stall near the Railway Station. After turning left at the traffic light at the Jalan Lahat/ Jalan Kidd junction, and after passing a few shops along Jalan Lahat he heard the sound of a burglar alarm and saw the door to Chitra Jewellery ajar. D They decided to stop in front of the shop because the owner and also the watchman of the shop were known to Kumaresan, the third accused.

The third accused entered the shop. He decided to follow him into the shop. The first accused waited in the car. There was no one in the shop. They entered the office of the shop and found its iron grille already opened E and items of jewellery were scattered about the floor of the office. The safe of the shop was open. He observed that some items of jewellery had been missing from the trays in the safe. They decided to take the items which were scattered on the floor and put them into a plastic bag which they found in the shop.

F They then went out of the shop into their car. They proceeded to the police camp where he was working at Ulu Kinta, by way of Tambun Road. He could not enter the camp as it was already very late at night. He decided to go to the place called Baling Bom instead. He entered the place through a side opening at Jalan Intek which led to the area called Baling Bom. He G put the jewellery into his clothing bag (Ex P102) and hid them under the tree.

Before his arrest he had never been to house No 82 Laluan Tasik Timur 16, the place where the three victims were found.

He denied having committed the murders in all the four charges jointly H and in common intention with the first accused.

On being cross-examined by the learned deputy public prosecutor, En Murtazadi, he admitted that he was a police Lance Corporal and that he was attached to the Sekolah Latihan Pasukan Polis Hutan at Ulu Kinta at the time the murders took place. He said he joined the police force in 1986 I and was interdicted in 1995. He was dismissed from service in April 1999. He got married in 1996 after his interdiction and lived with his wife in Kuala Lumpur. He came to know the first accused in 1996 when the first accused

was working for the third accused as a debt collector. After his interdiction he came to Ipoh often for his business as a broker and purchaser of pawn receipts.

He denied that he had financial problems one or two months before his arrest through his loss in the share market and that he was in dire need of money which had led him to plan the robbery.

He admitted renting the room at Hotel Ritz Kowloon on 15 February 1998 till the date of his arrest on 13 March 1998 and that during this time the first and the third accused had visited him.

He said he had visited the third accused often at his shop called Malika Jewellers and during his visits he had seen the first accused there.

He did not know the watchman of Chitra Jewellery although the place was only one shop away from Malika Jewellery.

He denied that Car Registration No PCV 7749 was rented for other purpose other than for travelling to Kuala Lumpur but admitted that he rented the car for a month from 7 February 1998. He said he returned it on 7 March 1998 and at the same time rented Car ACQ 4222 from the owner Ramaneswaran (PW11)

On being put to him, he denied:

(1) that he was a master mind of the robbery at the shop and that the three of them had planned the robbery at room 502 Hotel Ritz Kowloon, Ipoh, knowing that the owner of the shop had been away in India and that the shop would be managed by the wife (the deceased Virama).

(2) that he knew the deceased Virama had the key to the shop and the safe where the items of jewellery were kept and that he had gone to house No 82 to make observation alone knowing that only the son Sathiyan was alone in the house, while Virama was managing the shop.

(3) that later he instructed the first and third accused to enter into the house in order to obtain the key from Virama while he waited in the car ACQ 4222 about 500 metres from the house.

(4) that later he went into the house and discovered that the boy Sathyian had been killed but that he did nothing about the killing.

(5) that he instructed the first accused to wait for the return of Virama to the house to enable them to get the key to the shop and the safe from her.

(6) that he and first accused then waited in a room of the house for Virama to return while the third accused was out of the house.

(7) that he and first accused attacked and killed Virama and Juriyah after they came back to the house.

(8) that after they were dead he took the keys from Virama's handbag and left with the first accused in car Registration No ACQ 4222 while the third accused left in a motorcycle for the Ritz Kowloon Hotel.

(9) that on the same day at about 8.30pm they went to Malika Jewellery where the third accused called the jaga from Chitra Jewellery to come

over to Maliga Jewellery and that together with the first accused he had killed the watchman.

(10) that all the three of them later disposed of the body of the watchman at the North-South Highway by using car Registration No ACQ 4222.

(11) that after disposing of the body they then went back to the hotel and later came out again to rent the car Registration No PCV 7749 without returning the other car.

(12) that he drove the car Registration No ACQ 4222 while the first and the third accused drove car Registration No PCV 7749 and that they went back to Chitra Jewellery where he parked his car far away from his shop while the other car was parked in front of the Chitra Jewellery.

(13) that he and third accused entered the shop using the keys which they had taken from Virama earlier at the house and opened the safe where the items of jewellery were kept when the alarm was activated.

(14) that they had managed to take some of the jewellery with them and went back to the hotel by the same car Registration No PCV 7749.

(15) that later he and third accused returned to the place where he had parked the car Registration No ACQ 4222.

(16) that he went to the place called Baling Bom to hide the bag containing the jewellery using car Registration No PCV 7749 and that later he left the car in front of Wisma Chin Woo rather at the parking bay of the Hotel Ritz Kowloon and that he then walked back to the hotel.

On being cross examined by the supporting DPP Encik Abdul Rahim as to why he had to use Lahat Road to go back to Ritz Kowloon after their meal near the Railway Station, he explained that the first accused who was driving the car made an illegal U-turn and used the same road which they had used to come to and proceeded along the road leading to the Medan Kidd Roundabout and when they arrived at the Pasir Puteh/Menglembu traffic lights, he turned into Jalan Lahat.

He denied:

(1) that they had rented the car Registration No PCV 7749 at 11.45pm to facilitate their movement in the robbery.

(2) that when they went to the shop the alarm was not on and that the opening of the safe had activated the alarm.

(3) that they had in a rush taken some items of jewellery from the safe and put them into the travelling bag which they had brought along.

(4) that due to financial constrain he had to plan something to obtain money.

Evaluation of the defence of the second accused

Before proceeding to consider his defence one must be reminded at this stage of the trial that the case for the prosecution is unique and peculiar in

the sense that it is founded wholly on presumptive evidence. In order that his defence may be properly and correctly evaluated therefore, it is first necessary in due fairness to the second accused, to determine the parameter within which his defence would have to be assessed.

Logically, one would have expected that where a presumption is imposed upon an accused he would be required to rebut it in order to put up a credible defence. However, in law the duty to rebut arises only if the presumption is imposed by statute in which case an accused would be required to rebut it on a balance of probabilities (see Privy Council decision in *PP v Yuvaraj* [1969] 2 MLJ 89 at p 92 applying *R v Carr-Braint* [1943] 2 All ER 156 at pp 158–159.) Where the presumption is purely factual as in the instant case no burden is cast upon him to rebut it. All that is required of him is to raise a reasonable doubt on the prosecution's case. This aspect of appreciation of evidence is admirably described in the (1980) 66 *Malaya Law Review* at p 99 by GL Peiris of the Department of Law of the University of Colombo, Sri Lanka in an article entitled, 'The Burden of Proof and Standards of Proof in Criminal Proceedings: A comparative study of English Law and a codified Asian System'. Speaking of the procedure in countries whose law of evidence is modelled on the Indian Evidence Act 1872 (such as ours), he said:

> The presumption, when it is made, operates only to satisfy the evidential burden of the prosecution provisionally. The presumption arising from possession of recently stolen goods exemplifies a situation in which the accused is not required to prove or disprove the existence of any fact or facts, even on a balance of probabilities, to rebut the presumption. The raising of a reasonable doubt in regard to the facts which are held prima facie to have been proved constructively by application of the presumption, is tantamount to rebuttal of the presumption.

What constitutes in law a reasonable doubt has been defined by Denning J in *Miller v Minister of Pensions* [1947] 2 All ER at pp 372–373 in the following manner:

> If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

The starting point in my assessment of the defence relates to his demeanour, the manifestation of which appears not in his conduct but in the way he chooses to present his evidence with respect to two crucial features in the case for the prosecution. They are features which stood out against him glaringly that one would reasonably expect him to have vehemently spoken up against and to provide adequate and convincing explanation in furtherance of his defence.

The first feature is the fact that his culpability in all the four charges is founded on the discovery of some items of jewellery at the place called Baling Bom, which was referred to as Buang Grenade in his signed statement. The prosecution's evidence is clear that he had in fact led police

to its discovery by providing the information in words described in the signed statement.

The second is the time that the killings were alleged to have taken place. It is indisputable from the facts as established that the murders were already completed by lam on 13 March 1998, as Harminderjit Singh the youth who witnessed the incident at the jewellery shop had testified that he saw the two Indian youth coming out of the jewellery shop at about 1am.

With respect to the first, he has chosen not to say a word about the discovery of the jewellery although the evidence was damning enough against him. His failure to say anything on this crucial allegation convinces me that he did not have any defence worthy of consideration except for the bare denial that he committed the murders.

As for the second, he was merely contented to tell the court of his whereabout only from the time between 1am to 1.30am on 13 March 1998 when he was travelling in a car with the first and third accused. He had omitted to say anything of his whereabouts before 1am of that day. Only in cross-examination did he admit that earlier that night at about 11.45 pm (on 12 March 1998) he and the third accused had gone to rent the car. His failure to address the allegation in greater details and to provide a reasonable account of his activities prior to 1am, diminishes his credibility and opens to grave doubt as to whether he is a witness of truth.

Needless to say his failure to respond to these two telling features in a positive manner serves only to reinforce the prosecution's case against him.

But demeanour alone is not the sole criteria in judging a person's credibility. As Raja Azlan Shah FJ (then sitting as a High Court Judge hearing an appeal from the Sessions Court) said in *Tengku Mahmood v PP* [1974] 1 MLJ 110F:

> It is hardly necessary to go further back than *Tara Singh v PP* [1949] MLJ 88, 89. In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility.

There are other reasons why the second accused is not in my judgment a witness of truth and therefore should not be believed.

The renting of the car Registration No PCV 7749 at such a late hour is inconsistent with his explanation that he needed the car to go back to Kuala Lumpur that same night.

Firstly, there was ample time for him to have rented the car at an earlier hour. He had not provided any reason for renting it at such a late hour.

Secondly, this is inconsistent with the fact that he was still around in Ipoh after having rented the car. He had in fact stayed over well into the next day until he was arrested. The submission of counsel that he may have

changed his plan not to go back to Kuala Lumpur after having helped himself of some items of jewellery from the shop is plainly unacceptable. Given the fact that he had taken the jewellery from the shop and had safely hidden it, there was all the more reason for him to leave Ipoh.

Thirdly, his explanation that he had to rent the car Registration No PCV 7749 because the car Registration No ACQ 4222 which he had rented earlier had been used by the first and the third accused for their debt collection business is clearly inconsistent with the fact that in the normal course of event the third accused being himself a businessman and also being a local Ipoh resident could have rented another car for himself from Ramaneiswaran (PW11), for his own business. His explanation that he had to rent the car on behalf of the third accused because the owner would only rent the car to him as he had known him since 1992 is unacceptable because the owner of the car had testified that he had also known the third accused six months before the incident as the owner of Malika Jewellery. Further, on all the occasions when the second and third accused rented the car from the owner, the third accused had paid for the rental of the car.

Fourthly, one must ask the question as to why it was necessary for the third accused to accompany him to see Ramaneiswaran to rent the car since he wanted the car for his own use to travel to Kuala Lumpur. It could not have been for the reason that he wanted the third accused to pay for the rental since by his own admission he was not in any financial constrain.

Fifthly, if he had rented the car for the purpose of using it to go back to Kuala Lumpur, why was the car not used by him and was parked not at the hotel where he stayed but at a place in front of Wisma Chin Woo? Further it is clear that he had not been using the car as when he was arrested by Inspector Shamsul Bahari (PW5) some 13 hours later, he was in fact riding a motorcycle.

It is highly improbable that a robbery of the shop had taken place before the second accused entered it merely to pick up the jewellery as he had claimed, because it is clear from the evidence that there was no break-in. The evidence is clear that keys were used to open the shop, the grilled door to the safe and the safe itself. The fact that there was no break-in means that the keys were obtained from the house and supports the case for the prosecution that the persons in the house were killed in order to obtain the keys to the shop and the safe to facilitate a planned robbery.

Finally his explanation that he had gone into the shop to find out what had happened there is inconsistent with his innocence, because if this was really true, it would be reasonably expected that being himself a policeman he would have notified the authorities. He did nothing of the sort. Be that as it may, he had gone on to say that he decided to take away the jewellery. Again if this was really true, it would be reasonable to expect that after his arrest, at the first available opportunity he would have explained his predicament to the police. He did nothing of the sort before or even after his arrest. Instead, he had allowed himself to be interrogated and he only

informed the police of the existence of the jewellery after having been interrogated for two days.

In drawing the last conclusion I am aware of the accused's inherent right to silence — that he was not bound to disclose to the police after his arrest what his defence would be when he is charged in court. I am reminded of what Joseph Jr SCJ said in the Supreme Court case of *Teng Boon How v PP* [1993] 3 MLJ 553 which his lordship restated later in the Federal Court case of *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 at p 216 in the following passages:

> But, before we move on to consider other aspects of this appeal, we think it would not be out of place if we said something by way of guidance to the courts below when criticizing an accused person for having made a belated disclosure of his defence. It goes without saying that our remarks which follow apply only to those cases where there has, in fact, been a belated disclosure of the defence.
>
> It is clear law that a judge must tread warily when commenting on the fact that an accused has chosen to conceal the lines of his defence until the trial, rather than disclosing them at or about the time of his arrest during police interrogation. He may observe that such a stance would make it difficult for the police to check the veracity of the accused's version of the facts, and so, detracts from the *weight* to be accorded to it (see *R v Littleboy* [1934] 2 KB 408; *R v Ryan* (1966) 50 Cr App R 144). That, however, is as far as he can go, for should he go further and infer that such non-disclosure provides a basis for assuming that the accused is *guilty* (see eg *R v Sullivan* (1967) 51 Cr App R 102; *R v Hoare* [1966] 2 All ER 846), he would be misdirecting himself in law.
>
> Having said that, we must add that, when a judge has made an adverse comment about the belated stage at which an accused had made disclosure of his defence, *without an accompanying statement that the accused was under no obligation to make such prior disclosure, and that he is not drawing an inference of guilt from the belatedness of the explanation offered,* such comment would usually not be fair, and so would constitute a misdirection in law so serious that the conviction is liable to be quashed on this ground alone. In this context, we would draw attention to a recent decision of this court in *Teng Boon How v PR* [1993] 3 MLJ 553, where many of the relevant authorities on this point are referred to and analyzed.

I must emphasize here that in drawing the conclusion that I did, I am not inferring that by his failure to inform the police at the first reasonable opportunity of his story regarding his chanced discovery of the break in of the jewellery shop, he was in fact guilty. What I am inferring here is that such a story is inconsistent with his claimed innocence, which in my view I am entitled to draw without offending the rule in *Alcontara* and *Teng Boon How*.

The judgment

Having considered the evidence given by the second accused I am satisfied that he has failed to raise a reasonable doubt on the prosecution's case in

each of the four charges as amended. I must accordingly find him guilty and convicted on all the charges.

The only sentence which I am allowed to pass in each charge under the law is the sentence of death and in accordance with the provision of s 277 of the Criminal Procedure Code, I direct that he be hanged by the neck till he is dead.

Finding of guilt for both accused.

Reported by Jafisah Jaafar